

Missouri Attorney General's Opinions - 1960

Opinion	Date	Topic	Summary
2-60	Jan 8	Hon. Norman H. Anderson	WITHDRAWN
2-60	Jan 13	BAIL.	Where a bail bond is conditioned upon the principal's appearance for preliminary hearing or in the event that he is bound over to answer such charges filed against him by "indictment or information," such bond is sufficient to require his appearance in circuit court if preliminary hearing has been held or waived and the defendant has been bound over to answer charges prior to the return of an indictment or the filing of an information. Supreme Court Rule 32.05(b) and Criminal Procedure Form No. 26, promulgated by the Supreme Court of Missouri, do not require appearance for trial if an indictment is returned prior to a preliminary hearing being held or waived, and the court returning the indictment must secure its own bond.
2-60	Jan 14	CRIMINAL PROCEDURE. BAIL. SHERIFFS. BAIL BOND. SUPREME COURT RULE 32.03.	It is the opinion of this office that, under Supreme Court Rule 32.03, the sheriff is permitted but not required to admit a defendant to bail in the amount specified on the warrant.
2-60	Jan 22	ARREST. BAIL BOND. BAIL. TWENTY HOUR LAW.	One who has made bond under the provisions of Supreme Court Rule 21.14 to appear and answer to any charge that may be preferred against him may thereafter be subject to arrest for an offense entirely disconnected from the offense or offenses for which he was first arrested. This is true whether the offense for which the second arrest occurs was committed before or after the giving of such bond.
2-60	Mar 11	ENTOMOLOGIST. MISSOURI PLANT LAW. OFFER OF SALE.	(1) Section 263.040, V.A.M.S. 1949, does not mean that there must be rules and regulations promulgated for the enforcement of those sections of Chapter 263, V.A.M.S. 1949, which do not need such rules and regulations for their enforcement; (2) "Offering for sale" would be the exhibiting of something that may be taken or received or not, the taking or receiving of which would constitute a sale; (3) Section 263.120, supra, would be applicable to any person or truck driver in this state who is the recipient, while in this state, of any plant products brought from within or without this state which do not comply with the requirements of Section 263.100 and 263.110. It would not be applicable to any person who receives the plant or plant products while

			outside the State of Missouri when they bring the said plant products into this state.
2-60	Apr 4	SCHOOLS.	Individual, unincorporated association or not-for-profit corporation may operate summer school in school district buildings, without charge. Members of board and members of not-for-profit corporation contracting with district may be same persons, provided they have no direct or indirect pecuniary interest in such contract.
2-60	Apr 6	Hon. Norman H. Anderson	WITHDRAWN
3-60	Jan 26	FACSIMILE SIGNATURE. POWER OF ATTORNEY.	A facsimile signature of an officer of a surety company certifying as to the correctness of a power of attorney is a valid signature if the officer intends it to be his signature and he has been authorized by the board of directors to use a facsimile signature and the state in which the power of attorney is executed recognizes such signatures as being valid.
3-60	Apr 7	CITY MARSHAL. ELECTION.	A city marshal of a city of the fourth class may perform the duties enjoined upon him in the conduct of a city election although he is a candidate for re-election at such an election.
3-60	Oct 6	Hon. F. Neil Aschemeyer	WITHDRAWN
5-60	June 13	BANKING.	Maximum property lines of both the main banking house, and the facility to be established by authority found in House Bill No. 568, passed by the 70th General Assembly of Missouri, are to be used as termini in measuring the one thousand yards distance beyond which the authorized facility may not be separated from the main banking house.
5-60	July 1	Hon. G. D. Bauman	WITHDRAWN
7-60	Nov 1	ACCOUNTANCY. PUBLIC ACCOUNTANCY.	Firms can be registered as C.P.A.'s in Missouri if each member is resident of or engaged in practice of public accountancy in United States, is in good standing as a C.P.A. in a state, and if resident member holds Missouri C.P.A. certificate. Firm can be registered as public accountant if resident member holds Missouri certificate as C.P.A. or P.A. May practice under fictitious name if registered under fictitious name law and registered in state. May have Missouri address listed for such firm. Employees of firm not entitled to take Missouri C.P.A. examination unless firm actually practices in this state.
10-60	Jan 7	FEES. SHERIFF'S FEES. COURT EXPENSES.	Section 476.270, RSMo 1949, is the authorization for the payment of the three dollars allowed to a sheriff of a third class county for his attendance in a court of record or a criminal court, which may be

			retained by the said sheriff from the treasury of the county in which the court is held.
13-60	July 21	TAXATION. COLLECTOR.	A tax sale of a particular piece of property predicated upon a publication of notice of sale, which notice listed the name of C. C. Garrett, which name was neither the name of the record owner or the name of the owner appearing on the land tax book, both of the latter being in the name of C. G. Garrett, is invalid and that upon discovery of said defect prior to the delivery of a tax deed, the collector should refuse to issue to the certificate holder a deed.
13-60	Dec 5	Mr. Don E. Burrell	WITHDRAWN
14-60	Jan 18	TAX EXEMPT LAND.	A tract of land owned by the Branson Chamber of Commerce, which tract is used only for presenting a Christmas Nativity scene is used exclusively for charitable purposes and is not held for private or corporate profit and is exempt from taxation.
14-60	Apr 14	LOTTERIES.	Invitation by a newspaper to the public to submit to the newspaper predictions as to the outcome of twelve basketball games, and the score of one specific game, with the offer of a prize for the person who is most successful, contains the elements of prize, chance and consideration and is, therefore, a lottery and contrary to Missouri law.
15-60	May 6	STATE PENITENTIARY. DEPARTMENT OF CORRECTIONS. SHERIFFS. CIRCUIT COURTS.	Discussion of Section 546.615, V.A.M.S., including a holding that the sheriff is required to endorse all allowable jail time on the commitment papers.
15-60	Sept 20	MOTOR VEHICLES – HISTORIC.	May be used on highways without further registration so long as it is so used solely for exhibition and educational purposes.
16-60	Mar 9	BRIDGES. PUBLIC HIGHWAYS. INJURIES TO.	In enactment of Sec. 229.160, RSMo 1949, requiring movers of threshing machines, sawmills, steam engines, or gasoline tractors to lay down planks of not less than dimensions given, on floor of a bridge before moving any such machines thereover, and that failure to take said precautions, when resulting in injury to bridge, making mover liable in double amount of injuries, it was legislative intent that by expressly naming said machines all other types of machines were impliedly excluded. Diesel powered tractors and heavy machinery not within the purview of section.
16-60	Mar 21	SHERIFFS. COSTS. FEES. CRIMINAL LAW. CRIMINAL	Sheriff of third class county has duty to collect from a defendant convicted in a criminal case in magistrate court commission of 10% of costs taxes against such defendant and to pay such commission into the county treasury.

		PROCEDURE. MAGISTRATE COURT. COUNTIES.	
18-60	Mar 8	JACKSON COUNTY WATER SUPPLY DISTRICT NO. 1.	Before any expenses are paid to directors of Jackson County Water Supply District No. 1, an itemized expense account should be submitted by each said director claiming reimbursement therefor.
18-60	Oct 31	TAX LEVY. COUNTY JAIL.	A proposition submitted to the voters of Dade County at the election to be held November 8, 1960, to increase the constitutional tax rate 10 cents on the one hundred dollars valuation, if such proposition receives the required vote that it would be legal for the county court to proceed to build the jail from the proceeds acquired by the additional tax.
20-60	May 12	MOTOR VEHICLES.	Registration and licensing provisions apply to motor vehicles owned by not-for-profit educational institutions.
20-60	July 13	FICTITIOUS NAMES. CORPORATION. SECRETARY OF STATE.	It is proper and legal for James S. Kemper & Company to register as "Associated Mutuals," for the purpose of engaging in or transacting business in the State of Missouri, pursuant to Secs. 417.200 through 417.230, RSMo 1949, and Sec. 351.110, par. 2, RSMo 1949, does not vest the Secretary of State with such discretion which would permit him to refrain from registering James S. Kemper & Company as "Associated Mutuals" under the fictitious names laws.
21-60	Jan 5	EMINENT DOMAIN. CITIES, TOWNS AND VILLAGES.	Incorporated towns or villages have, by the terms of Section 80.090, RSMo 1949, the power of eminent domain to condemn land for the purpose of location and laying out of streets. Section 71.340, RSMo 1949, does not grant any powers of eminent domain, nor does it extend the powers granted under Section 80.090, RSMo outside the corporate limits of the town or village.
25-60	Jan 11	COMPACT ON MENTAL HEALTH.	Responsibility for payment of the cost of maintenance and care of an indigent resident of Missouri transferred to a Missouri State Hospital from another state where the Missouri county of residence is determinable rests upon such county; that where such county of residence cannot be determined, the cost of such maintenance is upon the Missouri State Hospital to which such patient has been committed. Where a nonresident of Missouri is accepted under the provision of the Interstate Compact on Mental Health for treatment in a Missouri State Hospital that the cost of such care and maintenance should be paid out of appropriations made to the Division of Mental Diseases of the Department of Public Health and Welfare.
25-60	Jan 11	INTERSTATE COMPACT ON	Missouri Interstate Mental Health Compact funds may not be used to transfer from a Missouri State Hospital a resident of a non-Compact

		MENTAL HEALTH.	<p>state who has come into Missouri as an escapee from a state hospital of another state.</p> <p>A resident of a compact state who is under Missouri commitment to a Missouri State Hospital as an emergency admission may not be transferred by the Missouri Compact Administrator to the patient's own state through use of Missouri Compact funds in the absence of clinical determination that the best interests of the patient would be served by such transfer.</p>
25-60	May 11	STATE SCHOOLS. PRIVATE PATIENTS. PATIENT SUPPORT.	<p>Senate Bill No. 93, enacted by the 70th General Assembly is applicable to a patient in a state school who was admitted prior to the effective date of such Senate Bill, and who has now attained his majority.</p> <p>Division of Mental Diseases, upon a finding that such a patient, admitted as a county patient, may be placed upon a pay patient status upon a finding by the division that the parents of such child are able to pay a certain amount for his support. In such a situation, parents are liable for the support of their children although such children have passed their majority. The Probate Court is no way involved in this matter.</p>
30-60	Sept 1	BOARD OF POLICE COMMISSIONER – KANSAS CITY, MISSOURI. MICROFILMING OF POLICE RECORDS.	<p>It is the opinion of this department that the order, pursuant to Section 109.140, RSMo 1949, authorizing the disposal, archival storage or destruction of records of the police department of Kansas City, Missouri, which have been photographed or microfilmed should be obtained from the Governor of Missouri.</p>
30-60	Oct 13	KANSAS CITY BOARD OF POLICE COMMISSIONERS.	<p>The Kansas City Police Department is not authorized by law to pay to its civilian employees a mere gratuity.</p>
32-60	June 15	ST. LOUIS COUNTY. CHARTER COUNTIES. COUNTY CHARTERS. ASSESSORS. COLLECTORS. COUNTY CLERKS.	<p>St. Louis County may, by amendment of its charter, abolish the elective offices of assessor and collector and establish a department of revenue under an elected director of revenue, which department shall perform all of the duties heretofore imposed upon the assessor and collector and the duties of the county clerk in connection with taxation.</p>
33-60	Jan 5	Hon. Spencer H. Givens	WITHDRAWN
33-60	Jan 12	EMPLOYMENT SECURITY LAW. CERTIFICATES OF ASSESSMENTS. FILING AND RECORDING FEES.	<p>Missouri Division of Employment Security's certificates of assessment showing amount of employers' delinquent contributions, interest and penalties under Section 288.170, RSMo Sum. Supp. 1957, shall be filed and recorded by circuit clerk without payment of his fees in advance.</p> <p>When filing and recording fees for certificates are unpaid at time circuit clerk's accounts are audited by state auditor, clerk cannot legally be</p>

		NOT PAYABLE IN ADVANCE. CIRCUIT CLERK NOT LIABLE FOR UNPAID FEES.	found liable to county for uncollected fees, if he has charged for and reported same to county court as provided by Sections 483.550 and 483.555, RSMo 1949.
33-60	May 23	SALARY. FIRST DEPUTY. CIRCUIT CLERK AND RECORDER. FOURTH CLASS COUNTY.	An employee who has been classified as a first deputy to the circuit clerk and recorder under Section 483.380, RSMo, C. S. 1957, in a fourth class county whose population brings it within the purview of subsection 2, Section 483.382, cannot by agreement or otherwise be paid less than the amount set forth in subsection 2, supra.
33-60	Oct 10	TOWNSHIP AUDITS.	The State Auditor will audit the books and accounts of a municipal township when requested to do so by 5% of the qualified voters of such township determined on the basis of votes cast for the office of Governor in the last preceding election. The actual cost of such audit to be paid by the township.
34-60	Aug 12	ELECTIONS.	Under general election laws, county court must establish at least one voting place in each township.
37-60	July 11	PUBLIC HEALTH NURSE. COUNTY COURT.	When a petition signed by 250 taxpayers of a county requesting the appointment of a public health nurse is presented to the county court, it is mandatory upon the court to make such appointment.
37-60	Feb 25	NURSING HOMES. LICENSE FEES.	The only fee required to be paid by the operator of a nursing home is a fee for a license to operate. A license to operate a nursing home should be issued and dated as of the time the home was found acceptable for licensure.
37-60	Oct 28	DEAD HUMAN BODIES. DEAD HUMAN BODIES - REMOVAL OF. DIVISION OF HEALTH. PERMIT. DISINTERMENT.	1. State Health Department or district health department or local board of health may issue permit authorizing a disinterred human body to be transported or removed to another cemetery for reinterment. 2. State Department of Health or any local board of health does not have authority to issue permits for disinterment of dead human body once interred.
37-60	Nov 3	DIVISION OF HEALTH. REGULATIONS REGARDING SANITATION IN SLAUGHTERING PLANTS.	The regulations submitted by the Division of Health regarding sanitation in slaughtering houses are compatible with the laws of Missouri; the Division of Health is authorized to promulgate such regulations, and such regulations are legal.
37-60	Nov 23	H. M. Hardwicke	WITHDRAWN

38-60	May 2	CITY ASSESSOR. CITY CLERK. COMPATIBILITY.	The same person may, simultaneously, hold the offices of city assessor and city clerk in a city of the fourth class.
41-60	Jan 11	Hon. Haskell Holman	WITHDRAWN
41-60	Dec 21	COUNTY AGRICULTURAL EXTENSION COUNCIL. THIRD AND FOURTH CLASS COUNTIES.	Office furniture, machines and equipment under control of county agricultural extension council, the purchase price of which is paid from appropriations of third or fourth class county to council, under Sections 262.591 and 262.601, RSMo Cum Supp 1957, is property of council. Said property shall not be included in annual inventory of county property required to be reported by county clerk of third or fourth class county under Section 51.155 RSMo Cum. Supp. 1957.
42-60	Feb 25	COUNTY COURTS. CONTRACTS.	A letter to a county court by an authorized officer of a construction company, offering to do certain work for the county for the actual cost of labor and materials plus 10%, and an entry made subsequent to the receipt of such letter by the county court accepting such offer, sufficiently constitute a written contract to comply with that requirement of Section 432.070, RSMo 1949, that such contracts "shall be in writing."
43-60	Feb 2	COUNTY OFFICERS. COUNTY RECORDER. COUNTY ASSESSOR.	Section 137.117, VAMS, requires that the county recorder furnish a description of property conveyed in terms of sections or fractional parts of sections, or by subdivisions, lots or parcels where subdivided into such unit and plat is duly recorded. If description cannot be furnished on the basis of these units then the recorder must furnish the assessor with a description which will enable the assessor to locate the property. The description furnished must contain the number of acres transferred when it is given in the instrument, together with the names of the grantor and grantee, the consideration paid and the book and page where the deed is recorded.
43-60	June 27	CHILD LABOR.	A child who has passed his fourteenth birthday but who is under the age of sixteen years may be employed, except in those occupations enumerated in Section 294.040, during summer vacations when school is not in session, without securing a work certificate.
43-60	Nov 10	Hon. C. M. Hulen, Jr.	WITHDRAWN
44-60	Feb 1	MUNICIPALITIES. AIRFIELDS. OPERATION. DISPOSITION.	When state aid is given a municipality to acquire a site, construct and place its memorial airfield in operation under Section 305.230 RSMo 1949, said municipality has no obligation to State of Missouri to continue operation of airfield for any definite period of time, but may dispose of same. Section 305.230 imposes no duty on municipality to reimburse state for prior grant of aid out of proceeds of airfield sale.
45-60	Apr 7	STATE PARK BOARD.	State Park Board is not authorized to enter into privately negotiated

		BONDS.	option agreement for sale of revenue bonds.
46-60	Apr 27	CITIES. POLICE BOARDS. ST. LOUIS BOARD OF POLICE COMMISSIONERS.	St. Louis Board of Police Commissioners may discontinue the use of state house if it deems it is no longer needed in the administration of police matters in the particular police district.
51-60	Nov 3	CIRCUIT CLERKS. ELECTIONS.	1. Duty of judges to return ballots and poll books to county clerk. 2. Duties of sheriffs at election. 3. Absentee ballots may be sent by certified mail. 4. Time off for voting applies although employee lives in county other than where he is employed. 5. Allowance to election judges for returning poll books and ballots to clerk and for services as election judge may not exceed maximum fixed by §111.350. 6. Circuit clerk who “earns” fees on change of venue receives such fees.
52-60	Mar 24	INSURANCE.	Articles of Incorporation of Old Security Casualty Insurance Company.
52-60	Apr 22	INSURANCE.	Articles of Incorporation of National Benefit Life Insurance Company.
52-60	June 15	INSURANCE.	Articles of Incorporation of Missouri Fidelity Life Insurance Company.
52-60	June 22	INSURANCE.	Articles of Incorporation of Modern Security Life Insurance Company.
52-60	Aug 5	Hon. Lon J. Lewis	WITHDRAWN
52-60	Aug 16	INSURANCE.	Combination policies filed under Section 379.017, V.A.M.S., should be disapproved for filing when the filing company’s own public rating record discloses that the rate of premium applicable to commercial “fire and allied lines” risks (and forming only a component part of the ultimate indivisible premium rate authorized for the combination policy) differs from the commercial “fire and allied lines” risk rate published for the filing company by the Missouri Inspection Bureau.
52-60	Sept 14	INSURANCE.	Articles of Incorporation of Security Standard Life Insurance Company.
52-60	Oct 14	INSURANCE.	Articles of Incorporation of Safeway Mutual Insurance Company.
52-60	Nov 22	INSURANCE.	Articles of Incorporation of Fairfax Life Insurance Company.
52-60	Dec 8	INSURANCE.	Articles of Incorporation of Life Insurance Company of St. Louis.
54-60	Feb 17	FERTILIZER. AGRICULTURE.	Penalties under fertilizer law assessed on basis of monetary value of deficient nutrients. Treble penalty cannot be assessed when penalty is paid to purchaser.
58-60	Oct 6	DRAINAGE DISTRICTS. JOHNSON GRASS.	With the permission of the land owners within the Birmingham Drainage District, and with the permission of land owners immediately outside of the Birmingham Drainage District, which are adjacent to the

			river side of the levee, the Board of Supervisors of the Birmingham Drainage District may expend funds in their hands for the eradication of Johnson grass.
59-60	Feb 19	SCHOOLS. COUNTY BOARDS OF EDUCATION. DISQUALIFICATION OF MEMBERS.	A portion of Section 165.667 RSMo 1949, disqualifying member of county board of education who changes his residence to same municipal township or school district in which another board member resides, strictly construed. It has no application to board member who has not changed residence, but because of reorganization of smaller pre-existing school districts to form larger district with extended boundaries, member's residence is located in same school district as that of another member, former member not disqualified and will continue to serve remainder of term.
59-60	May 19	SCHOOLS. REORGANIZED DISTRICTS.	1. Section 165.257, RSMo 1949, is applicable to every school district in Missouri not maintaining approved high school offering work through twelfth grade. 2. Pupil living in reorganized district does not have unrestricted right to attend high school in any other district. Right to attend school of choice subject to limitations of Section 165.257, RSMo 1949. 3. When reorganized district not maintaining high school provides transportation for resident pupils to approved high school of adjoining district and some of said pupils are provided transportation by another adjoining district to its high school, reorganized district is obligated to pay for transportation in excess of specified state aid to said other adjoining district.
62-60	Jan 28	SCHOOLS.	Petition for annexation of one school district to another void when districts did not adjoin at time of filing petition. County board of education acquires jurisdiction by submitting plan of reorganization subsequently.
62-60	Apr 6	Hon. William B. Milfelt	WITHDRAWN
62-60	July 13	COUNTIES. COUNTY COURTS. RABIES. HEALTH.	The county court of a third-class county does not have authority to appoint a rabies control officer or to authorize the county health center trustees to do so. Without authority for appointing such rabies control officer public funds may not be used to pay the salary of any such officer.
62-60	Aug 25	CITIES. CITY ELECTIONS. ELECTIONS. ELECTION EXPENSES. SCHOOL DISTRICTS. SCHOOL DISTRICT ELECTIONS.	Whenever a school district, located primarily but not wholly, within a third class city holds its annual election in conjunction with the city's annual election, the school board shall be responsible for those election expenses which are in addition to the election expenses normally expended by the city for an election.

		VOTING MACHINES.	
69-60	Jan 7	TAXATION. TAX SALE. COUNTIES.	In the event of an invalid tax sale, a county would not be obligated or liable for any amounts in excess of a refund of the purchase moneys plus interest.
69-60	Oct 13	PUBLIC OFFICERS. RECORDER OF DEEDS. FEES AND SALARIES. COMPENSATION.	The fee provided by Section 59.490, V.A.M.S., for adding names to the alphabetical list and furnishing certified copies of veterans' discharges may be retained by the recorder of deeds as unaccountable fees and is not to be considered in determining the maximum amount which the recorder may retain set forth in Section 59.250, V.A.M.S.
69-60	Nov 17	NEPOTISM. LIBRARIES. COUNTY SUPERINTENDENTS OF SCHOOLS. COUNTY LIBRARY DISTRICT. OFFICERS.	Section 182.050, RSMo, forbidding employment of relatives of trustee by county library board of trustees or librarian is applicable to relatives of county superintendent of schools, an ex officio member of the board of trustees.
71-60	Dec 7	COUNTIES.	If county budget for Class 3, provided for in Section 50.680, RSMo 1949, is not sufficient to take care of unforeseen expense in that fund, the county court may use money in Class 6 to defray such expenses if Class 6 contains a sufficient sum not subject to restrictions mentioned in said statute.
72-60	Jan 13	LIBRARIES. MERGER. CITY AND COUNTY TAXES. TAX RATE NOT REQUIRED TO BE EQUALIZED.	When city library district with tax rate of ½ mill, and county library district, with rate of one mill, are to be merged under provisions of Section 182.040, RSMo Cum. Supp., 1957, equalization of tax rates before districts can be merged is not required.
72-60	Apr 20	COUNTY HOSPITALS.	The hospital board of trustees does not have the authority to spend accumulated money in the hospital fund for a promotion or advertising campaign preceding a bond election to enlarge the public hospital.
72-60	Dec 8	CITY OFFICERS. ASSISTANT CITY MARSHAL.	An assistant city marshal of a third class city is prohibited by law from selling the city in which he is assistant marshal, a motor vehicle because of the fact that he is a city officer.
75-60	Oct 10	JURY. JURY FEES. COUNTIES.	In civil cases wherein a change of venue has been granted the county to which the venue has been changed is liable for duly authorized jury fees over and above the amounts which are taxed as costs and collected from the unsuccessful party.

76-60	June 16	Hon. James M. Robertson	WITHDRAWN
80-60	Jan 18	BOARD OF PUBLIC BUILDINGS. DIRECTOR OF PUBLIC BUILDINGS. CHIEF OF PLANNING AND CONSTRUCTION. PUBLIC BUILDINGS.	Chief of Planning and Construction is not authorized or directed to exercise any authority in conjunction with construction of medium security penal institution at Moberly, Missouri.
81-60	July 14	ABSENTEE BALLOTS. LEGAL INHERITANCE.	It is legal to vote an absentee ballot on July 4th.
81-60	Sept 19	Hon. Virgil R. Sheffield	WITHDRAWN
83-60	Mar 1	WATER POLLUTION BOARD.	Industrial waste of sewage or other wastes which emanate from the property of an individual, a partnership or corporation but which do not reach a stream, river, lake or other body of water is not subject to the provisions of Chapter 204, RSMo, Cum. Supp. 1957, and is not, therefore, within the control and purview of the water pollution board.
83-60	Mar 21	SUBDISTRICT WATERSHEDS. COSTS.	Mill tax money which is collected in subdistrict watersheds established under Chapter 278, Missouri Revised Statutes, Cumulative Supplement, 1957, may be used to pay the cost of advertising for bids and the construction of works of improvement in the watershed development; such tax money may not be used in connection with the election of trustees; administrative costs closely connected with construction of works of improvement may be paid from proceeds of the mill tax; such other items of administrative costs as may not be paid out of such mill tax money, may be paid out of fund of the soil conservation district or districts in which the subdistrict in question is located.
83-60	Sept 6	COUNTY COURT.	Presiding Judge unauthorized by any Missouri statute to adjourn court on his own motion, when all three judges are present and when motion is not presented to entire court and adopted by a majority of the members present, voting in favor of the motion.
83-60	Oct 14	CRIMINAL LAW. PUBLIC HEALTH AND WELFARE.	Untried information referred to in Section 222.080 V.A.M.S. embraces (1) informations by prosecuting attorneys in misdemeanor cases filed under Supreme Court Rules 21.03 and 21.047 and (2) informations filed by prosecuting attorneys in circuit court in felony cases after preliminary hearing has been accorded as required by Supreme Court Rule 23.027 but does not include an original "complaint" in felony cases made by a prosecuting attorney or other person, under authority found in Supreme Court Rule 21.08, preceding a preliminary hearing.

			A Probate court or magistrate court is within descriptive term “court of record” as same is used in subparagraph (2) of Section 202.595 V.A.M.S. authorizing application for institutionalization in Missouri’s “state schools” for mentally deficient but either court must have acquired proper jurisdiction of the persons in the premises.
83-60	Nov 10	CRIMINAL LAW. PUBLIC SERVICE COMMISSION.	A person convicted under Section 390.171, Missouri Revised statute, Cum. Sup., 1957 should be punished upon the basis of the statutory penalty set forth as punishment for the conviction of a misdemeanor in Section 556.270 RSMo 1949.
83-60	Dec 7	REGISTERED ENGINEERS. MUNICIPALITIES.	The Water Pollution Board should accept plans and specifications submitted by duly appointed city engineers without regard to whether they are licensed in the state.
84-60	May 6	PUBLIC ADMINISTRATORS. ESTATES. PROBATE COURTS.	The Legislature has prescribed by passage of Section 473.153, paragraph 5, V.A.M.S., that every administrator who is not an attorney, may not appear in court, except by attorney, and this section of law includes public administrators who must meet the same requirements as an individual administrator, and public administrators, like individual administrators, may file their own inventories and settlements.
84-60	Sept 21	Hon. Floyd L. Sperry, Jr.	WITHDRAWN
85-60	Jan 29	WATER POLLUTION BOARD.	All employees of the Water Pollution Board come within the compass of the merit system, except for the exemptions noted in Section 191.070, RSMo, Cum. Supp. 1957. The Water Pollution Board is an “appointing authority” within the meaning of Section 36.020, House Bill No. 111 enacted by the 70th General Assembly.
85-60	May 6	ELECTIONS. COUNTY CLERK.	County clerk not required under Chapter 116 to publish notice that registration books will be closed for a period of 28 days before election. Cost of publication of such notice is not a proper expense of the county.
85-60	July 22	COUNTY TREASURERS. COUNTY OFFICERS. COUNTY DEPOSITORIES.	The county has a duty to reimburse county treasurer for his expenses in making bank deposits at the various county depositories, where such depositories are located outside the county seat. Reimbursement may be made on the basis of actual expenses or by mileage, but if made on a mileage basis, it must not exceed actual expenses.
87-60	May 6	STATE REPRESENTATIVE. QUALIFICATIONS. NOT REQUIRED TO BE TAXPAYER.	Article III, Sec. 4, Constitution of Missouri, 1945, and Section 21.080, RSMo Cum. Supp. 1957, providing qualifications of state representatives do not require that one shall have paid a county tax in the county of his residence prior to his election to be eligible to said office.
88-60			

89-60	Jan 12	VOLUNTARY DISSOLUTION OF CORPORATION.	A corporation seeking dissolution under Section 351.460, RSMo 1949, may be permitted to dissolve without compliance with Sections 351.125 and 351.135, RSMo 1949, if the corporation has not registered and made the affidavit required by these sections.
92-60	Dec 22	Hon. Harold L. Volkmer	WITHDRAWN
93-60	June 20	COUNTY TREASURER. TOWNSHIP FORM OF ORGANIZATION.	A sheriff in a third class county under the township form of organization is eligible to be elected to the office of county treasurer.
96-60	Jan 29	SCHOOLS.	Limitation on submission of subsequent plan of reorganization applicable only to area within which vote was taken on previous plan, and not to remainder of county wherein no vote has been taken within one year.
96-60	Feb 16	SCHOOLS. SCHOOL DISTRICTS.	Petition for change of boundary lines between six-director districts must be signed by qualified voters who come from and equal 10% of the qualified voters of one of districts affected and may originate in either district affected thereby.
96-60	Apr 6	COUNTY HOSPITALS. COUNTY TREASURER. BOND.	The premium on the bond of a county treasurer, which bond was required by the county court, to secure moneys belonging to a county hospital which are in his hands, may not be paid out of the hospital money but must be paid from the general revenue fund of the county.
96-60	Oct 28	SCHOOLS. STATE BOARD OF EDUCATION. SCHOOL DISTRICTS.	The statutory provisions found within Section 165.677, RSMo Cum. Supp. 1957, which give the State Board of Education sixty days in which to consider county reorganization plans for school districts and return to the county board approved or disapproved, are directory. These provisions are designed to expedite reorganization of school districts and tardy compliance does not invalidate the proceedings taken thereunder. However, it is incumbent upon the State Board to adhere to this schedule as nearly as practicable. Even though the provisions are directory, they are meant to be followed as closely as possible.
97-60	May 25	VOTING. VOTERS. VOTER REGISTRATION. REGISTRATION. COUNTY COURT. ELECTIONS.	A proposition for the adoption of county registration of voters under Chapter 114 V.A.M.S. is to be submitted to the voters for a vote on such proposition at the next general election occurring more than 30 days after the petition is presented to the county court.
97-60	Aug 31	JOHNSON GRASS. TOWNSHIP	(1) In counties with township organization it would be the responsibility of the township to control Johnson grass on the right of

		COUNTIES. TAXATION.	ways which are owned, occupied or controlled by those individual townships; (2) Townships in counties under township organization declared a Johnson grass extermination area, authorized by Section 263.265, V.A.M.S. 1959 to levy upon all property subject to their authority a tax in an amount not to exceed five cents on each \$100 assessed valuation, for the purposes of this act, are of necessity the governing body which determines the amount of that tax to be levied within the maximum allowed.
97-60	Sept 9	PUBLIC ADMINISTRATOR. INHERITANCE TAX APPRAISER. PROBATE COURT.	The public administrator may be appointed and serve as an inheritance tax appraiser of an estate pursuant to Section 145.150 and there is no incompatibility between the duties of a public administrator and a tax appraiser except in cases where the public administrator is acting pursuant to Sections 473.743 et seq.
97-60	Sept 19	ROADS. CLOSING. COUNTY COURTS.	In a situation where, by virtue of the authority granted in Section 228.110, RSMo 1949, twelve freeholders or a township have filed an application with the county court for the closing of a road in such township and no remonstrances against the closing of the road have been filed and the time within which the filing of remonstrances could be made had expired, it is not mandatory upon the county court to close such road, but is discretionary.
99-60	Jan 7	SHERIFFS.	Section 57.105, V.A.M.S., requires the sheriff to fingerprint and photograph only those persons taken into custody upon the execution of a warrant of arrest or placed in his custody by a commitment order of a court.
99-60	Mar 23	ELECTIONS. ALIENS. DISQUALIFIED FROM VOTING. DISQUALIFIED FROM VOTING – WHEN.	Filing of petition for naturalization as United States citizen by alien, who has not been finally awarded citizenship, said alien is not citizen of U.S. within the meaning of Article VIII, Section 2, Constitution of Mo., as amended, and is not entitled to vote at any elections by people of Missouri.
99-60	May 12	Hon. Larry M. Woods	WITHDRAWN
99-60	Nov 7	CRIMINAL LAW. CRIMINAL PROCEDURE. FELONIES.	A defendant in a felony case may, under the provisions of Section 22(a) of Article I of the Missouri Constitution of 1945, waive his right to trial by jury, if approved by the court. Supreme Court Rule 26.01 establishes the method of waiver of trial by jury in any criminal case. Section 546.040, RSMo 1949, requiring mandatory trial by jury in all felony cases, is unconstitutional.
100-60	Nov 8	CITIES, TOWNS & VILLAGES.	Bridgeton, Missouri, is a special charter town; sections 106.300 and 80.800 RSMo 1949, do not apply to the town of Bridgeton.

		SPECIAL CHARTER TOWN.	
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BAIL: Where a bail bond is conditioned upon the principal's appearance for preliminary hearing or in the event that he is bound over to answer such charges filed against him by "indictment or information," such bond is sufficient to require his appearance in circuit court if preliminary hearing has been held or waived and the defendant has been bound over to answer charges prior to the return of an indictment or the filing of an information. Supreme Court Rule 32.05(b) and Criminal Procedure Form No. 26, promulgated by the Supreme Court of Missouri, do not require appearance for trial if an indictment is returned prior to a preliminary hearing being held or waived, and the court returning the indictment must secure its own bond.

January 13, 1960

Honorable Norman H. Anderson
Prosecuting Attorney
St. Louis County
Clayton, Missouri



Dear Sir:

This is in reply to your recent request for an opinion as to the legality of a bonding procedure followed in St. Louis County, where a complaint has been filed in magistrate court, but before a preliminary hearing has been held a grand jury indictment is returned on the same charges and the circuit court, by memorandum, thereupon seeks to adopt the bail set by the magistrate for appearance at the preliminary hearing. Your letter reads as follows:

"A procedure is used in St. Louis County in cases involving felonies, wherein the charge is originally filed in the Magistrate Court and then later heard by a Grand Jury.

"I have outlined the procedure and would appreciate an opinion from your office as to its legality. I would appreciate any other advice that your office might give relative to the instant problem.

"The procedure is as follows:

"In a felony case against a defendant, there is an Affidavit filed in a Magistrate Court and the case is set for a preliminary hearing before the Magistrate. The defendant makes bond set by the Magistrate. Then before the preliminary hearing is held, the same case is presented to the Grand Jury. In those cases where a True Bill is returned by the Grand Jury, the Circuit Judge, by memorandum,

Honorable Norman H. Anderson

orders the Magistrate to make the bond a continuing bond, returnable in the Circuit Court (if, in the opinion of the Circuit Judge, the bond is sufficient) and orders the Magistrate to forward all papers and the bond to the Circuit Court. The Prosecuting Attorney's Office then enters a nolle prosequi as to the pending case in the Magistrate Court.

"In these cases the Capias that is issued subsequent to the Indictment is not, in fact, executed.

"I am attaching a memorandum that is typical of those files in the cases I discussed."

The sample memorandum enclosed with your letter as used by the circuit court in purporting to adopt this bond reads:

"The Court being informed that the defendant, John Doe, is presently charged with an offense arising out of the same actions of the defendant, and with a charge for the same offense in the Second Magistrate District of St. Louis County, as the Grand Jury has returned by Indictment in this cause; and the Court finds that the defendant has provided good and sufficient bond for his appearance in the aforesaid cause pending in the Second Magistrate District; therefore, the Court orders that the bond in the cause now pending in the Second Magistrate District be a continuing bond to assure the appearance of the defendant in this cause, and orders that the Magistrate transmit that bond together with the transcript in the cause pending before him as aforesaid to the Circuit Clerk of St. Louis County."

After a preliminary study of the questions involved, we wrote to you requesting that you submit a copy of the bond used by the magistrate court and which is "adopted" by the circuit court in such instances.

The bond which you forwarded to us is Criminal Procedure Form No. 26 promulgated by the Supreme Court of Missouri. This bond requires appearances before the magistrate court for preliminary hearing and also purports to cover either an indictment or an information filed after the defendant has been bound over to circuit court, as well as his appearance in magistrate court. The conditions of

Honorable Norman H. Anderson

this bond read:

"NOW THEREFORE, if the said defendant shall be and appear in this court on the day of _____, 19____, for preliminary examination herein and from time to time thereafter as required by the Court and will submit himself to the orders and process of the magistrate and that if he be bound over as a result of such preliminary examination or a waiver thereof to answer said charge, then he personally be and appear before the Court at a time to be stipulated by the Magistrate before whom such preliminary hearing is held or waived and thereafter from time to time as required by the order of the said Court for trial and all other proceedings upon such charge as may be filed against him by indictment or information in said court, including the sentence and rendition of final judgment in said cause and shall abide and submit himself to the orders, judgment, sentence and process of said court and shall be and appear in any other court to which said cause may be taken by change of venue from time to time as required by such court for all proceedings, including the trial and rendition of sentence and final judgment, not thence to depart without leave, then this bond shall be null, void, and of no effect, otherwise, in full force and effect in accordance with law." (Emphasis ours.)

The bond further provides:

"All sureties herein submit themselves to the jurisdiction of this court and of the court in which such indictment may be found or information filed upon this charge, after preliminary hearing or waiver thereof, or to any court to which said cause may be taken on change of venue and irrevocably appoint the clerk of such court in which said cause from time to time shall be pending as an agent upon whom may be served for them any notice, motion, pleading or process having to do with any proceeding for the forfeiture of this bond." (Emphasis ours.)

Honorable Norman Anderson

Fundamentally, a court in construing a bond cannot increase the obligation of a bond nor extend the obligations of either the principal or surety beyond the terms of the bond itself. Any construction purporting to do so would be subject to reversal. This rule is ably stated by the United States Supreme Court in *Reese v. United States*, 9 Wall. 13, 19 L. Ed. 541, 1.c. 544:

"* * * Any change in the contract, on which they are sureties, made by the principal parties to it without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking."

Other than the conditions of the bond itself, the obligation is also conditional on the law of the state pertaining to bail bonds.

Accordingly, we shall examine the Missouri law on the subject to determine the effect of the applicable law of this state in respect to obligations under this form of bail bond.

Our Supreme Court has held that once an indictment has been returned, jurisdiction to hear the cause set forth in the indictment rests with the court returning the indictment, i.e., the circuit court.

In *State v. Gieske*, 108 S.W. 528, the rule is stated as follows, 1.c. 527:

"* * * The section has reference only to informations filed in the circuit or criminal courts which have jurisdiction to hear and determine the guilt or innocence of an accused, and not to informations filed before the justice of the peace or before the St. Louis court of criminal correction, merely for the purpose of binding the defendant over on bail or commit him to jail to await the action of a grand jury or the filing of an information in the circuit or criminal court by the prosecuting or circuit attorney, so that the St. Louis court of criminal correction had no power to retain the case before it for preliminary examination of the defendant after the grand jury had preferred the

Honorable Norman Anderson

indictment in this case."

Therefore, after either an information is filed or an indictment returned in circuit court, that court has jurisdiction and the magistrate court, conversely, no jurisdiction.

We note that your bond follows in general the requirements imposed by Supreme Court Rule 32.05(b) as to conditions of bonds after a complaint has been filed in magistrate court and for the defendant's appearance for preliminary hearing. This provision reads as follows:

"(b) If a person is admitted to bail for his appearance for a preliminary examination upon a complaint charging the commission of a felony the condition of his bond shall be that he will appear for such examination at a stipulated time, and from time to time as required by the magistrate, that he will submit himself to the orders and process of the magistrate; that if he is bound over to answer the charge upon which he has been granted a preliminary examination or as to which he has waived such examination, he will appear in the court in which an indictment may be found or an information filed against him, at a stipulated time, and from time to time as required by the court, to answer the charge; that he will submit himself to the orders, judgment, sentence and process of the court having jurisdiction to try such offense, either originally or upon change of venue; and that he will not depart without leave."

The conditions of the defendant's bond also follows the court rule in that it requires his appearance not only for trial in circuit court, but it also extends to rendition of sentence and final judgment. Likewise, the sureties also submit themselves not only to the jurisdiction of the magistrate court issuing such process but also to the court in which an indictment is found or an information filed, i.e., circuit court.

Note that Supreme Court Rule 32.05(b) requires that the conditions of the bond be such that the principal agrees to "submit himself" to the jurisdiction of the magistrate court for a "preliminary examination" and to submit himself from time to time in response to the orders and process of the magistrate. The rule further states that "if he be bound over to answer the charge upon which he has been granted a preliminary examination or as to which he has waived such examination, he will appear in the court in which an indictment may

Honorable Norman Anderson

be found or an information filed against him."

It is our view that this rule contemplates two events as conditions precedent to the bond applying to informations or indictments filed against him so as to require his appearance in circuit court for trial. These two conditions are, of course, holding a preliminary hearing or waiver thereof by the defendant and, secondly, that he be bound over as a result of such preliminary hearing. The form of the bond specifically requires that a preliminary hearing be held or waived and that he be bound over to answer charges in circuit court.

Conclusion

Therefore, it is the conclusion of this office that Supreme Court Rule 32.05(b) and Criminal Procedure Form No. 26, promulgated by the Supreme Court of Missouri, require that a preliminary hearing be held or waived and that the principal on the bond be bound over to answer charges before proceeding by indictment or information, if the same bond is to be used to require appearance for trial as is used to require his appearance at preliminary hearing. Conversely, if preliminary hearing is not held or waived and the defendant is not bound over to answer charges, then Supreme Court Rule 32.05(b) and the terms of Criminal Procedure Form No. 26 promulgated by the Supreme Court of Missouri, do not require the principal's appearance for trial on return of an indictment and purported adoption by the circuit court of the magistrate's preliminary hearing bond. Where an indictment is returned before a preliminary hearing is held the magistrate court would then have no jurisdiction to hold a preliminary hearing and the court returning the indictment must secure a bond conditioned on the defendant's appearance in that court.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Jerry B. Buxton.

Yours very truly,

John M. Dalton
Attorney General

JBB:aw

CRIMINAL PROCEDURE:

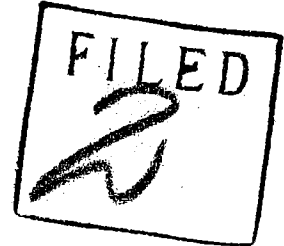
BAIL: SHERIFFS:

BAIL BOND:

SUPREME COURT RULE 32.03:

It is the opinion of this office that, under Supreme Court Rule 32.03, the sheriff is permitted but not required to admit a defendant to bail in the amount specified on the warrant.

January 14, 1960



Honorable Norman H. Anderson
Prosecuting Attorney
St. Louis County
Court House
Clayton, Missouri

Dear Mr. Anderson:

This is in response to your request of October 2, 1959, for an opinion of this office which request reads as follows:

"This office has been requested to obtain an opinion on an interpretation of Section 32.03 of the Supreme Court Rules of Criminal Procedure. The Sheriff of St. Louis County asks whether or not it is mandatory under Supreme Court Rule 32.03 that the Sheriff or other peace officer admit a defendant to bail, under the conditions set forth in said Section, when a Circuit Judge or Magistrate is available for the purpose of setting bond."

In your subsequent letters of November 12 and November 20, you advised that the sheriff desires to know whether he could refuse to admit a defendant to bail when a bondsman appears to make bond for the defendant in a case where a warrant has been issued by a magistrate or circuit judge and the amount of the bond is endorsed on the commitment and a magistrate or circuit judge is available. You advised that it was the opinion of your office that, by using the word "may," Supreme Court Rule 32.03 permits the sheriff to admit a defendant to bail but does not make it mandatory upon him to do so.

Supreme Court Rule 32.03, Revised Statutes of Missouri, Cumulative Supplement 1957, reads as follows:

"When the sheriff or other peace officer shall have a person under arrest and in custody by virtue of a warrant issued upon an indictment for a felony, or upon a warrant of commitment

Honorable Norman H. Anderson

for failure to furnish bail, and the amount of bail is specified on the warrant, the sheriff or other peace officer may admit the defendant to bail in the amount so specified. If the defendant is under arrest and in custody by virtue of a warrant issued upon a complaint, information or indictment charging the commission of a misdemeanor, the sheriff or other peace officer may admit the defendant to bail in the amount specified upon the warrant or, if the amount of bail is not so specified and the judge or magistrate thereof is not in the county, the sheriff or other peace officer may admit the defendant to bail in an amount not less than \$100.00 nor more than \$1,000.00."

It is to be noted that where the defendant is under arrest and in custody by virtue of a warrant issued upon a complaint, information or indictment charging the commission of a misdemeanor, and the amount of bail is not specified on the warrant the sheriff or other peace officer may admit the defendant to bail in an amount of not less than \$100.00 nor more than \$1,000.00, if a judge or magistrate is not in the county. So long as the judge or magistrate is in the county, as was the situation described in your request, the sheriff has no authority to fix the amount of the bail.

The answer to your inquiry concerning the duty or obligation of the sheriff to admit a defendant to bail when the amount of the bond is endorsed on the commitment depends upon the construction placed upon the use of the word "may" by the Supreme Court in the above quoted rule.

Rule 32.03 is very similar to Section 544.560, Revised Statutes of Missouri, Cumulative Supplement 1957, which reads as follows:

"When any sheriff or other officer shall arrest a party by virtue of a warrant upon an indictment, or shall have a person in custody under a warrant of commitment on account of failing to find bail, and the amount of bail required is specified on the warrant, or if the case is a misdemeanor, such officer may take bail, which in no case shall be less than twenty-five dollars, and discharge the person so held from actual custody."

Honorable Norman H. Anderson

The meaning of words used in statutes are subject to the rule of construction enunciated in Section 1.090, Revised Statutes of Missouri, Cumulative Supplement 1957, which reads as follows:

"Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."

We believe that the rule of construction enunciated in the above quoted statute is applicable to Supreme Court rules and that the words used in the rules should be taken in their plain or ordinary and usual sense.

The word "may" ordinarily means permissive or directory and operates to confer discretion, while the words "must" and "shall" are generally construed to mean mandatory, but such terms may at times be used interchangeably. 82 C.J.S. 877.

In Black's Law Dictionary, Fourth Edition, the word "may" is defined as "An auxiliary verb qualifying the meaning of another verb by expressing ability, competency, liberty, permission, possibility, probability or contingency."

We believe that it must be concluded that in Rule 32.03 the Supreme Court used the word "may" in its usual and ordinary sense. Had they intended to make the rule mandatory that the sheriff admit a defendant to bail, they would have used the word "shall" instead of the word "may." The language used in Supreme Court Rule 32.01 supports this conclusion. In Rule 32.01, it is provided that when a defendant is entitled to bail the judge or magistrate shall admit him to bail, but if the court is not in session the clerk of the court may admit the defendant to bail.

It is also to be noted that Supreme Court Rule 21.14, prior to the amendment of December 1, 1958, provided that persons arrested and held in custody without warrant shall be discharged within twenty hours unless a warrant is subsequently issued and that such a person "may be admitted to bail." The rule as amended provides that such a person "shall be entitled to be admitted to bail."

CONCLUSION

Therefore, it is the opinion of this office that, under Supreme

Honorable Norman H. Anderson

Court Rule 32.03, the sheriff is permitted but not required to admit a defendant to bail in the amount specified on the warrant.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Calvin K. Hamilton.

Yours very truly,

JOHN M. DALTON
Attorney General

OKH/cm/nls

ARREST:
BAIL BOND:
BAIL
TWENTY HOUR LAW:

One who has made bond under the provisions of Supreme Court Rule 21.14 to appear and answer to any charge that may be preferred against him may thereafter be subject to arrest for an offense entirely disconnected from the offense or offenses for which he was first arrested. This is true whether the offense for which the second arrest occurs was committed before or after the giving of such bond.

January 22, 1960



Honorable Norman H. Anderson
Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Mr. Anderson:

You have recently requested an opinion from this office concerning the following matter:

"When a defendant is arrested on a specific offense and prior to the filing of a formal complaint is released on an appearance bond, can such defendant then be arrested prior to the return date of the appearance bond for a different crime unrelated entirely to the original arrest if (a) the subsequent arrest was for a crime committed prior to the issuance of the appearance bond, and (b) the subsequent arrest was for a crime committed subsequent to the issuance of the appearance bond?"

The right to bail is provided for in the Constitution of Missouri in Article I, Section 20, which reads as follows:

"That all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great."

Honorable Norman H. Anderson

Supreme Court Rule 21.14 concerns those who are arrested without warrant and limits their detention to a period of 20 hours. This rule provides that one so arrested is entitled to make bail. It reads as follows:

"All persons arrested and held in custody by any peace officer, without warrant, for the alleged commission of a criminal offense, or on suspicion thereof, shall be discharged from such custody within twenty hours from the time of arrest, unless they be held upon a warrant issued subsequent to such arrest. While so held in custody, every such person shall be permitted to consult with counsel or other persons in his behalf. If the offense for which such person is held in custody is bailable and the person held so requests, he shall be entitled to be admitted to bail in an amount deemed sufficient by a judge or magistrate of a court of such county or of the City of St. Louis having original jurisdiction to try criminal offenses. Such admission to bail shall be governed by all applicable provisions of these Rules. The condition of the bail bond shall be that the person so admitted to bail will appear at a time and place stipulated therein (which shall be a court having appropriate jurisdiction) and from time to time as required by the court in which such bond is returnable, to answer to a complaint, indictment or information charging such offense as may be preferred against him."

Thus, it appears that your question concerns an individual who has been arrested without a warrant and who makes bond during the 20 hour period, which bond is conditioned according to the provisions of Rule 21.14 that he will appear before the court at the time desig-

Honorable Norman H. Anderson

nated "to answer to a complaint, indictment or information charging such offense as may be preferred against him." It is this broad condition that he will answer to such charge "as may be preferred against him" which creates the problem. In the normal situation, the individual gives bond to answer to a specific charge and, of course, is subject to arrest on any other charge or for any other offense the same as one who is not under bond. It is normally held that one who has made bond is not subject to be again arrested for the same charge (except as is provided where the bond is found to be inadequate or in other similar circumstances). See *United States v. Gordon*, 190 F. 2d 16, 1.c.19.

However, in the instant case the individual who makes the bond has not been charged with a specific offense and by making the bond he agrees to appear and answer any charge that may be preferred against him. Thus, the question arises as to whether he has, by making the bond, agreed to answer for any and all offenses that he may have committed in the past or only those which grow out of or are connected with the offense or offenses for which he was arrested. It is submitted that the latter construction is the only one which is feasible. From a reading of Rule 21.14 as quoted above, it is apparent that the framers of this rule were considering the problem in light of an arrest for one specific offense. Of course, for the arrest to be legal, the arrest must be made for a specific offense or offenses which the arresting officer has reasonable grounds to believe that the person has committed. The rule provides that the arrested person may make bail only if the offense for which he is held is bailable (under the provisions of Article I, Section 20, of the Constitution). Thus, the court must determine the bailability of the offense or offenses by reference to the specific offense or offenses (and perhaps by the surrounding circumstances) for which the individual is held in custody. Furthermore, in setting the amount of bond, the court must, of course, take into consideration the nature of the offense or offenses for which the individual has been arrested. Thus, the whole context of Rule 21.14 is directed toward a specific offense or offenses, and it is only when this rule provides for the condition of the bond that language is used which

Honorable Norman H. Anderson

could be interpreted to include offenses for which the individual is not under arrest. It is submitted that this broad language is used for the purpose of giving leeway to the prosecuting officials when framing the formal charge to be preferred against the person who has been arrested without a warrant. For example, one may be arrested in connection with an offense which, prior to the new stealing statute, might have been larceny or might have been embezzlement. Under this rule a precise determination of the technical charge to be preferred is not required when the person arrested is released on bond before the expiration of the 20 hour limit.

As has been pointed out in our previous opinion to you dated August 18, 1959, an individual is required to post only one bond to secure his release (within the 20 hour limit) from arrest without a warrant, however, we believe that it would be unreasonable to hold that this one bond would cover offenses for which he was not under arrest, no matter when they were committed and which are entirely disconnected from and have no relation to the offense or offenses for which the individual is arrested.

An extensive search has revealed no case in this or any other jurisdiction wherein a similar situation was considered. However, it is believed that the discussion of the court in *Ex parte Vogler*, 110 Texas Criminal Reports 579, 9 S.W. 2d 733, 62 A.L.R. 456, may be appropriate. The court said, 1.c. 62 A.L.R. 461:

"We have examined the authorities cited in the motion as well as others, and have found none on facts such as those before us, or on facts demanding the application of any analogous principle, which hold that one on bond in a pending habeas corpus case, who has therefore or does thereafter violate the law in such manner as that the question of the violation vel non is not involved in, or connected with, or affected by the matters at issue in the pending habeas corpus hearing, may not be properly

Honorable Norman H. Anderson

arrested by an officer merely because he knows of the pending proceeding. Such holding in our opinion, would be little short of monstrous. To hold that one merely detained by health officers, and who may be at large on bail pending a habeas corpus hearing set weeks later, is thereby privileged from arrest for murders committed, thefts perpetrated, ravishments done, or any other violation of law, merely because the arresting officer had knowledge of such pending habeas corpus proceeding would make for incredible confusion and disorder. If the contention thus made be sustained, then habeas corpus writs might be sued out, and that fact published, so that all officers would have knowledge thereof, and the hearing thereon might be purposely delayed, and bond made so that forsooth the parties might thereafter commit wholesale crime, extending over a period of time, and be privileged from arrest."

We likewise believe that one arrested without a warrant and who makes bond within the 20 hour period is not thereby rendered immune from arrest for other crimes entirely disconnected from the crime or crimes for which he was arrested. For example, one might be arrested for a misdemeanor and be released by the court on a relatively small bond and thereafter the officials might discover that there was reasonable grounds to believe that he had committed rape, murder, or other serious crimes which, in fact, might not be bailable under our Constitution. It would, we believe, be inconceivable that the making of the bond for a misdemeanor would insulate such an individual from arrest for such serious offenses. While the wording of the rule does state that the bond will require the person to appear and answer any charge that may be preferred against him, it is believed that the scope of this language must be limited by the tenor and context of the rule and that, in fact, by making bond he only promises to appear and answer to the charge or charges that may be preferred against him growing

Honorable Norman H. Anderson

out of the occurrence or occurrences for which he was arrested. We do not believe that it was the intention of the Supreme Court of Missouri when this rule was promulgated to so insulate one who has made bond under Rule 21.14 from what would otherwise be lawful arrest on charges which have absolutely no connection with the offense or offenses for which the individual was arrested.

It is desired to emphasize that such arrest of one who is on bond under Rule 21.14 can legally occur only where the second arrest is for an offense or offenses that are entirely disconnected from and have absolutely no relation to the offense or offenses for which the individual was previously arrested, and on which he has made bond conditioned that he will appear and answer the charge or charges that the prosecuting officials determine to be proper.

You have also inquired as to the propriety of an arrest for an offense which occurred after the individual was arrested and made bond. In view of the above, it follows that such arrest would not be prevented by the fact that the individual has made bond concerning some prior occurrence. The theory of bail is not adaptable to a promise today to appear to answer charges for offenses that may be committed in the future.

CONCLUSION

It is, therefore, the conclusion of this office that one who has made bond under the provisions of Supreme Court Rule 21.14 to appear and answer to any charge that may be preferred against him may thereafter be subject to arrest for an offense entirely disconnected from the offense or offenses for which he was first arrested. This is true whether the offense for which the second arrest occurs was committed before or after the giving of such bond.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Fred L. Howard.

Yours very truly,

John M. Dalton
Attorney General

FLH:mc:lc

ENTOMOLOGIST: (1) Section 263.040, V.A.M.S. 1949, does not mean
MISSOURI PLANT LAW: that there must be rules and regulations promul-
OFFER OF SALE: gated for the enforcement of those sections of
Chapter 263, V.A.M.S. 1949, which do not need such
rules and regulations for their enforcement; (2) "Offering for sale"
would be the exhibiting of something that may be taken or received or
not, the taking or receiving of which would constitute a sale; (3)
Section 263.120, supra, would be applicable to any person or truck
driver in this state who is the recipient, while in this state, of any
plant products brought from within or without this state which do not
comply with the requirements of Section 263.100 and 263.110. It would
not be applicable to any person who receives the plant or plant products
while outside the State of Missouri when they bring the said plant
products into this state.

March 11, 1960

Honorable Julius R. Anderson
State Entomologist
Department of Agriculture
Jefferson City, Missouri



Dear Mr. Anderson:

This is in response to your request for an opinion of
January 15, 1960, which we quote in part:

"In Section 263.040, does this mean that there
must be rules and regulations made before the
provisions and requirements of the Law can be
carried out, or can the statutes be carried out
even though there may not have been a specific
regulation to cover that point in the statutes?

"In Section 263.070, paragraph 4, mention is
made regarding a nursery dealer selling or offer-
ing for sale nursery stock. What constitutes
'offering for sale'? If a nursery dealer has this
material set out in a yard where it is displayed
for the purpose of customers to look over and
choose the varieties they want, would this be a
case of offering for sale, even though there was
no price list on the individual items?

"Under Section 263.120, it mentions any person
who received nursery stock from without this state,
etc., would this include a truck driver or other
transporting officials, or individuals who have
received this nursery stock for delivery to
customers who have previously ordered the stock,
even though it had been ordered from out-of-state?
In the case, the point here is that the nursery
stock came into the state without correct certi-
fication when found on the truck. Can the truck
driver be required to hold this material for inspec-
tion or other disposal as mentioned in Section 263.132?

Honorable Julius R. Anderson

"Would the police force of one municipality have the authority to make an arrest upon the request of the State Entomologist or one of his assistants, even though the violation had occurred in another municipality. Such as, a violation was spotted in Creve Coeur, but the interception was in Olivette. Could the Olivette police force make the arrest even though the violation had occurred in Creve Coeur?"

Section 263.040, V.A.M.S. 1949, is as follows:

"The state entomologist shall, from time to time, make rules and regulations for carrying out the provisions and requirements of this law, including rules and regulations under which inspectors and other employees shall;

(1) Inspect places, plants and plant products, and things and substances used or connected therewith;

(2) Investigate, control, eradicate and prevent the dissemination of insect pests and diseases; and

(3) Supervise or cause the treatment, cutting and destruction of plants and plant products infested or infected therewith."

Black's Law Dictionary, De Luxe Fourth Edition, defines the word "shall" in part as follows:

"As used in statutes, contracts, or the like, this word is generally imperative or mandatory. McDunn v. Roundy, 191 Iowa 976, 181 N.W. 453, 454; Bay State St. Ry. Co. v. City of Woburn, 232 Mass. 201, 122 N.E. 268; U.S. v. Two Hundred and Sixty-Seven Twenty-Dollar Gold Pieces, D. C. Wash., 255 F. 217, 218; Baer v. Gore, 79 W. Va. 50, 90 S.E. 530, 531, L.R.A. 1917B, 723.

"In common or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command, and one which has

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always or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning, and it is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears. *People v. O'Rourke*, 124 Cal. App. 752, 13 P.2d 989, 992. * * *

Considering the definition set forth above, Section 263.040 is mandatory, by the use of the word "shall", but only to the extent that the rule to be made is necessary to the proper carrying out of the specific law in question. The fact that rules and regulations shall be made does not preclude the enforcement, by appropriate authorities, of those statutory laws which are enforceable without rules and regulations. It is conceivable that the legislature might enact a section of a law in which it requires rules and regulations to be issued before the law itself would become effective, but this is not involved in Chapter 263. Section 263.040, supra, is specific in that it states rules and regulations shall be made for carrying out the provisions and requirements of this law. Therefore, when the provisions and requirements of this law may be validly carried out without a rule or regulation, it would appear obvious that no rule or regulation need be made.

With respect to your second question, we again turn to the Fourth Edition of Black's Law Dictionary for the purpose of defining the term "sale". You will see therein that it is defined as:

"A contract between two parties, called, respectively, the 'seller' (or vendor) and the 'buyer,' (or purchaser,) by which the former, in consideration of the payment or promise of payment of a certain price in money, transfers to the latter the title and the possession of property. *Pard. Droit. Commer.* §6; 2 *Kent Comm.* 363; *Poth. Cont. Sale*, §1; *Butler v. Thomson*, 92 U.S. 414, 23 L.Ed. 684. In re *Frank's Estate*, 277 N.Y. S 573, 154 Misc. 472."

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Considering the definition of "sale", we now turn to the definition of the term "offer" also set forth in the Fourth Edition of Black's Law Dictionary:

"To bring to or before; to present for acceptance or rejection; to hold out or proffer; to make a proposal to; to exhibit something that may be taken or received or not. Morrison v. Springer, 15 Iowa 346; People v. Ah Fook, 62 Cal. 494."

It is our opinion that the significant part of this definition of the term "offer" would be that part which states "to exhibit something that may be taken or received or not." It would seem only logical that an offer of sale could be made by a nursery dealer who has displayed his material for sale in a yard so that prospective customers might look over and choose the varieties they want. It would appear to be essential, however, that it is his intention to have them set forth for sale, and that they were set forth for the acceptance or rejection of a prospective buyer. It would seem that the presence of a price list would not necessarily be necessary to an offer of sale. It might, however, be considered as evidence of one's intention to offer for sale. This should not be conclusive. Therefore, it might well be considered that a nursery dealer has offered his stock for sale when this stock has been set out in a yard where it is displayed for customers to look over and choose the varieties they want.

You will observe that the reasoning set forth above is not inconsistent with statements made by the Supreme Court of Oregon in the case of State v. Dunbar, 11 Pac. Rep. 298, 299. The court therein states in part:

"* * * Laws are usually enacted with some reference to the common understanding and customs of men in respect to subject-matters which concern their business transactions; so that, when goods or merchandise are exhibited from the show windows or shelves of a store, we have a right to presume, sanctioned by common usage and understanding, that he who puts them there offers them for sale, and if the fact is otherwise, let him show it. Goods, therefore, may be offered for sale without any overt act of solicitation. * * *"

At page 300 the court also states, with reference to an offer of sale, that:

Honorable Julius R. Anderson

"* * * It may be done by general advertisements in the press, or by exhibitions of signs or symbols in the vicinity of the place of the alleged business, or by having the article on sale, with intent to dispose of it, to any offering to purchase." * * *

Section 263.120, V.A.M.S. 1949, states:

"Any person in this state, who receives from without this state any plant or plant product as to which the requirements of section 263.100 have not been complied with, or who receives any plant or plant product sold, given away, carried, shipped, or delivered for carriage or shipment within this state as to which the requirements of section 263.110 have not been complied with, shall immediately inform the state entomologist or an inspector thereof, and isolate and hold the said plant or plant product unopened or unused, subject to such inspection and other disposition as may be provided for by the state entomologist."

We believe in answer to your third question that the clause "any person in this state" as used in Section 263.120, supra, would appear to be all-inclusive. However, in considering the entirety of this section of the law, we do not believe that it refers to any person in this state who has brought the plant products into Missouri from another state. We believe that it refers to, and is only applicable to, any persons within the State of Missouri who have received from within or without the state, while that person is in the State of Missouri, a shipment of plant products. It would thus not be applicable to a situation in which a person goes from Missouri to another state and subsequently returns to Missouri bringing the plant products with him.

Our position above, we feel, is substantiated by the fact that Section 263.100 makes it unlawful for any person to bring or cause to be brought into this state any plant products listed in the rules and regulations made pursuant to this law, unless the proper packaging and tagging has been completed. It would appear that any person violating the provisions of Section 263.100 would be subject to the penalty provisions set forth in Section 263.180, and that it is the appropriate section which may be enforced against those persons bringing or causing to be brought into this state any plant products in violation of this chapter.

Honorable Julius R. Anderson

With respect to your specific question, "Can the truck driver be required to hold this material for inspection or other disposal as mentioned in Section 263.120", our answer would be that he could not, unless he had received the plant products while he was in the State of Missouri. Should he be the recipient of the plant products brought into the state from another state, in violation of this chapter, it would then be his responsibility to report to the State Entomologist, and those plant products would be subject to inspection and other disposition by the State Entomologist pursuant to Section 263.120.

With respect to your last question, our office rendered an opinion to the Honorable Edward Garnholz, Clayton, Missouri, on December 27, 1955, which we believe answers your question. We are enclosing a copy of that opinion for your study, and in it you will note that in St. Louis County a person may not be arrested for a misdemeanor without a warrant unless the arresting officer saw the misdemeanor committed.

CONCLUSION

It is the opinion of this office that:

(1) Section 263.040, V.A.M.S. 1949, does not mean that there must be rules and regulations promulgated for the enforcement of those sections of Chapter 263, V.A.M.S. 1949, which do not need such rules and regulations for their enforcement;

(2) "Offering for sale" would be the exhibiting of something that may be taken or received or not, the taking or receiving of which would constitute a sale;

(3) Section 263.120, supra, would be applicable to any person or truck driver in this state who is the recipient, while in this state, of any plant products brought from within or without this state which do not comply with the requirements of Section 263.100 and 263.110. It would not be applicable to any person who receives the plant or plant products while outside the State of Missouri when they bring the said plant products into this state.

The foregoing opinion, which I hereby approve, was prepared by my assistant, James B. Slusher.

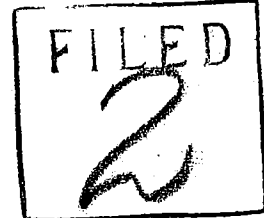
Yours very truly,

JOHN M. DALTON
Attorney General

JBS/mlw
Enclosure

SCHOOLS: Individual, unincorporated association or not-for-profit corporation may operate summer school in school district buildings without charge. Members of board and members of not-for-profit corporation contracting with district may be same persons, provided they have no direct or indirect pecuniary interest in such contract.

April 4, 1960



Honorable Norman Anderson
Prosecuting Attorney
St. Louis County
Courthouse
Clayton 5, Missouri

Dear Sir:

This is in reply to your letter of December 3, 1959, requesting an opinion from this office on two questions relating to the possible use of school buildings for the purpose of operating a summer school. Your inquiry reads:

"We have been requested to seek an opinion from you concerning the following two items:

(1) May the board of education of a city, town or consolidated school district permit an individual, an unincorporated association, or a not-for-profit corporation operate a summer school program in school buildings of the district, without charge under the authority of Section 166.030, Revised Statutes of Missouri, 1959?

(2) Assuming the board of education may permit a not-for-profit corporation to operate a summer school program, can the members of the board of education of the district, acting in their individual capacities, be the members of the not-for-profit corporation and contract with the school district for the use of the buildings?

"As these are questions which effect not only the school district involved but all school districts in the County and State we feel that they are of sufficient importance to forward them to you for an opinion."

Honorable Norman Anderson

We have subsequently been informed that the courses contemplated being taught in the summer school about which you inquire are the subjects normally a part of the public school curriculum.

Section 166.030, RSMo, relating to the care of school buildings, reads:

"1. The board of directors or board of education shall have the care and keeping of all property belonging to the district, and shall provide the necessary globes, maps, charts, apparatus, supplementary books, and other material for the use of the school. The board shall keep the schoolhouses and other buildings in good repair, the grounds belonging thereto in good condition, and shall provide fuel, heating apparatus, and other material and appliances necessary for the proper heating, lighting, ventilation and sanitation of the schoolhouses; shall have the floors swept and fires made at the expense of the district, and cause an accurate account of the expense thereof to be kept and a report of the same to be made at the next annual meeting.

"2. The board of directors, or board of education, having charge of the schoolhouses, buildings and grounds appurtenant thereto, may allow the free use of such houses, buildings and grounds for the free discussion of public questions or subjects of general public interest, for the meeting of organizations of citizens, and for such other civic, social and educational purposes as will not interfere with the prime purpose to which such houses, buildings and grounds are devoted; provided, that at any annual or special meeting the use of the schoolhouse for any of the above purposes may by a majority vote of the qualified voters voting on the proposition be prohibited. Such prohibition shall remain in effect until the next annual school meeting.

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"3. Whenever any such application shall be granted and the use of such houses, buildings or grounds shall be permitted for the purposes aforesaid, the board of directors, or board of education, having charge of the same may provide, free of charge, heat, light and janitor service therein when necessary, and may make such other provisions, free of charge, as may be needful for the convenient and comfortable use of such houses, buildings and grounds for such purposes, or said boards of directors, or boards of education, may require all such expenses to be paid by the organization or persons who are allowed the use of the houses, buildings and grounds. All persons upon whose application, or at whose request, the use of any schoolhouse, building, or part thereof or any grounds appurtenant thereto, may be permitted as herein provided, shall be jointly and severally liable for any injury or damage thereto which directly results from such use, ordinary wear and tear excepted; provided, however, this section shall not apply to cities which have or may hereafter have seventy-five thousand inhabitants or more." (Emphasis ours.)

By our opinion to you dated November 13, 1959, this office determined that a six-director school district could not conduct a summer school in addition to its regular school term for both high school and elementary school children. We did not attempt, in that opinion, to cover situations where such a summer school program was carried on by an individual or unincorporated association or a not-for-profit corporation.

The underscored portion of paragraph 2 of Section 166.030, supra, indicates that the board of directors of the school district may permit the free use of the district's buildings for "educational purposes," among other civic and social purposes which this section allows and the school district's voters do not prohibit. We think that conducting a summer school can, without a doubt, be considered as an "educational purpose."

The term "education" has been defined judicially in State vs. Lesueur, 99 Mo. 552, 13 SW 237, 238, as follows:

Honorable Norman Anderson

" * * * The following definition appears to have been prepared with care: "Education" is the bringing up, physically or mentally, of a child, or the preparation of a person, by some due course of training, for a professional or business life or other calling." 6 Amer. & Eng. Cyclop. Law, 158. * * *

Conducting a summer school within this definition would clearly seem to be within the purposes enumerated by the statute.

As a legal proposition, we do not see that it makes any difference whether the summer school is conducted by an individual, an unincorporated association or a not-for-profit corporation. In permitting such use of the school property, the board of education would undoubtedly want to consider such things as the responsibility, stability and continuity of the person or group using the building, but that is a matter of policy not of law.

Having concluded that a summer school program may be operated by a not-for-profit corporation, the next question is whether the same persons may be both members of the board of education and members of the not-for-profit corporation and contract with the school district for the use of the buildings.

As a general proposition, a member of a school board may not enter into a contract with the board of which he is a member. See enclosed opinions to Fred C. Bollow dated June 30, 1948, Homer L. Swenson dated July 17, 1950; James T. Riley dated May 15, 1953, and James W. Farley dated January 9, 1957. The reason for this rule of public policy is to eliminate the possibility of temptation of a public official to serve his own personal interests to the prejudice of the interest of those for whom the law authorized him to act in the premises as an official.

As shown in the enclosed opinion to Rolin T. Boulware, dated May 15, 1958, the interest on the part of a public official which will invalidate a contract is a pecuniary interest. If the corporation entering into a contract with a school district for the conduct of a summer school is one not-for-profit and if the members thereof have no direct or indirect pecuniary interest in the contract, we perceive no reason why the same persons could not be both members of the board of education and members of the not-for-profit corporation.

Honorable Norman Anderson

CONCLUSION

It is the opinion of this office that the board of education of a six-director school district may permit an individual, an unincorporated association or a not-for-profit corporation to operate a summer school program in a school building of the district without charge. It is the further opinion of this office that the same persons may be both members of the board of education and members of the not-for-profit corporation and may contract with the district for the conduct of a summer school in the school district buildings, provided the members of the not-for-profit corporation have no direct or indirect pecuniary interest in such contract.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JEB:JWI:ml
Encs (5)

FACSIMILE SIGNATURE: A facsimile signature of an officer of a
POWER OF ATTORNEY: surety company certifying as to the correct-
ness of a power of attorney is a valid
signature if the officer intends it to be
his signature and he has been authorized by the board of directors
to use a facsimile signature and the state in which the power of
attorney is executed recognizes such signatures as being valid.

January 26, 1960



Honorable Omer H. Avery
Member, Missouri Senate
21st District
Troy, Missouri

Dear Senator Avery:

This is in response to your request of November 14, 1959,
for an opinion, which request reads in part as follows:

"A question has arisen concerning the
legality of a power of attorney contain-
ing the facsimile signature of an officer
of the company certifying to the correctness
of the instrument. I will appreciate your
consideration of the matters herein set forth
and the advice of your office regarding same.

"Under the procedure used by Travelers, bond
writing agents operate under powers of attorney
which are executed by an officer at the Home
Office in Hartford. Each agent is then fur-
nished with multiple copies of this power
certified to at Hartford by facsimile signa-
ture (see specimen power enclosed). One such
certified copy is attached to each bond as it
is executed, to evidence the authority of the
agent involved. The Company uses more than
250,000 of these certified copies annually.
Other large insurers, such as, U.S.F. & G.,
I understand, have the same problem. Because
of the large number involved, it is quite im-
portant that these powers be accepted universally.
In most instances they are accepted without
question. It is my view that these powers
should be accepted.

Honorable Omer H. Avery

"A power of attorney is an instrument which stems in contract law and hence if valid where executed should be valid everywhere. Travelers is a Connecticut corporation. It executes a valid legal power in Connecticut to one of its agents and certifies it there. Under Connecticut law the use of the facsimile signature is legal, and such signature where it is so intended is the equivalent of the original signature of the subscriber. The facsimile signature is authorized by the Company as evidenced by resolution of the Board of Directors and authorized by the By-Laws of the Company. The last subscriber, by facsimile signature, certifies as to the correctness of the power of attorney. I am advised that it is to that signature that an objection has been made. No objection is raised to the fact that the signatures of the Secretary of the Company and of the Notary Public are printed. If such powers of attorney must be signed individually, it would require the service of numerous clerks and assistant secretaries and would involve delays and unwarranted expense, all of which would have to be passed on in the form of enhanced premiums.

"Until recently, bonds with power of attorney prepared as this one were accepted by all County officials, but now one County official feels that where, if there were a default on a bond, it would be necessary for the County to allege and prove that the carrier is estopped to deny the facsimile signature. Estoppel, of course, is a matter of defense, and no large insurance carrier would risk resisting its responsibility by challenging the validity of the facsimile signature on documents emanating from that Company. Of course, having accepted the premium for the bond, the Company would be estopped, regardless. Indeed, if a surety

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company were to attempt to repudiate its obligation and deny its own facsimile signature, the Superintendent of Insurance would no doubt threaten immediate reprisal. Anyone having experience in this field will realize how completely effective such action would be.

* * * * *

"I would greatly appreciate your consideration of the matters set forth in this letter, and an opinion of your office as to the legality of powers of attorney executed and certified to by facsimile signature of an officer at the home office."

In connection with the question posed in your request, it is interesting to note that Missouri, by statute, now approves the use of facsimile signatures in certain situations and on certain documents.

The 70th General Assembly enacted the "Uniform Facsimile Signature of Public Officials Law" which may be found in Sections 105.273 to 105.278, inclusive, V.A.M.S. Sections 105.273 and 105.274 of the above-cited law read as follows:

105.273

"(1) 'Public security' means a bond, note, certificate of indebtedness, or other obligation for the payment of money, issued by this state or by any of its departments, agencies or other instrumentalities or by any of its political subdivisions:

"(2) 'Instrument of payment' means a check, draft, warrant or order for the payment, delivery or transfer of funds:

"(3) 'Authorized officer' means any official of this state or any of its departments, agencies, or other instrumentalities or any of its political subdivisions whose signature to a public security or instrument of payment is required or permitted;

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"(4) 'Facsimile signature' means a reproduction by engraving, imprinting, stamping, or other means of the manual signature of an authorized officer." (Emphasis ours)

105.274.

"Any authorized officer, after filing with the secretary of state his manual signature certified by him under oath, may execute or cause to be executed with a facsimile signature in lieu of his manual signature:

"(1) Any public security, provided that at least one signature required or permitted to be placed thereon shall be manually subscribed; and

"(2) Any instrument of payment.

"Upon compliance with sections 105.153 to 105.158, by the authorized officer, his facsimile signature has the same legal effect as his manual signature."

We have made a search of the statutes but have been unable to find one which sets out the form and requirements for a power of attorney. Chapter 442, RSMo 1949, which pertains to title to real estate and the conveyance thereof, has some sections which relate to powers of attorney to convey title or transfer an interest in real estate. For example, Section 442.360 provides that every power of attorney containing a power to convey title to real estate shall be acknowledged, certified and recorded. None of the provisions of Chapter 442, including Section 442.360, specify that the signatures be actual "wet ink" signatures.

Section 490.570, RSMo 1949, does not require that powers of attorney be acknowledged and certified in the same manner as deeds conveying or affecting real estate but provides that they may be acknowledged or proved and certified in such manner, and if they have been, they may be read in evidence without further proof of the execution thereof. Likewise this section makes no requirement with respect to the signature on the power of attorney or acknowledgment.

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The statutes relating to bonds for public officials and performance bonds make no requirement as to the power of attorney executed by surety companies. Likewise, we have been unable to find any Missouri cases which have considered the use of the facsimile signatures by the officer of a surety company certifying to the correctness of the power of attorney. It is pointed out that while a power of attorney is usually attached to a bond, it is not a necessary part thereof but is attached thereto as evidence of the authority of the agent or attorney at fact.

Section 1.020 (17), RSMo 1949, provides that where a statute uses the words "written, in writing, and writing word for word" that those words shall include printing, lithographing, or other mode of representing words and letters. Section 1.020 (17), supra, reads as follows:

"(17) 'Written' and 'in writing' and 'writing word for word' shall include printing, lithographing, or other mode of representing words and letters but in all cases where the signature of any person is required, the proper handwriting of such person, or his mark, shall be intended;" (Emphasis ours)

We do not believe that the above-quoted section can be interpreted to require that the certification of the officer of a surety company as to the correctness of the power of attorney must bear the actual "wet ink" signature of the officer.

In the absence of a statute requiring the actual "wet ink" signature of a person, the cases of Missouri hold that facsimile signatures may be valid and binding.

In *City of Maplewood v. Johnson*, 273 S.W. 237, 1.c. 239, certain instruments had been signed with a rubber-stamp signature. The court, in its opinion, said:

"* * * This leaves the rubber stamp signature of Wm. F. Riley Construction Company intact, and it is a well settled rule of law that any mark intended as a signature acts as such.

* * * * *

Honorable Omer H. Avery

"[6] III. The name of the corporation was rubber stamped on the tax bills. Whether the president or the secretary of the contractor affixed it, the record does not show. It does show, however, that the president was present, and it may be inferred that he saw that it was so affixed, and consented and intended that it act as the signature of the corporation in the matter of the assignment."

The court, in *Dinuba Farmers Union Co. v. Anderson Gro. Co.*, 193 Mo. App. 236, 247, in considering the requirements of the statute of frauds, said:

"* * * Indeed, the name of the party to be charged may be either in writing or in print or by stamping the name upon the memorandum
* * *."

In *Horner v. Mo. Pac. R'y. Co.*, 70 Mo. App. 285, 291, which involved a statute providing, among other things, that bills of lading may be made negotiable by written endorsement thereon, the court said:

"* * * The word writing, in law, not only means words traced with a pen or stamped, but printed or engraved or made legible by any other device. * * *"

The courts of many other jurisdictions have also held that a signature may be any mark, printing, writing, or stamping which is intended to be a signature. *Hill v. United States*, 288 Fed. 192, 193; *Toon v. Wapinitia Irr. Co.*, 243 Pac. 555; *Hamilton v. State (Indiana)*, 2 N.E. 299; *Ardery v. Smith (Indiana)*, 73 N.E. 841.

Hagen v. Grisby, 155 NW 3, involved a statute requiring summonses to be subscribed by the plaintiff or his attorney. The Supreme Court of North Dakota held that a summons bearing the typewritten name of the plaintiff's attorney complied with the statute and was valid.

In *Costilla Estates Development Company v. Mascarenas (N. Mexico)*, 267 Pac. 74, the defendant offered as a defense in an action in ejectment the judgment of another court establishing

Honorable Omer H. Avery

his title against plaintiff. One of the objections raised to the introduction into evidence of the judgment was that the signature of the clerk thereon was made by rubber stamp. The statute involved required the clerk to "sign his name" on documents filed by him. The court held that the rubber stamp signature was sufficient, stating at page 77:

"This statute does not require the clerk to write his name; only that he sign it. Generally a signature, if adopted as such, may be printed, lithographed, or typewritten, as well as written. 36 Cyc. 443. The decisions there collected show that signatures not autographs are held sufficient to satisfy a variety of statutory and other requirements. * * *"

The general rule seems to be that a corporation may adopt or authorize the execution of documents by a typewritten, printed or rubber stamp signature, and, if the adoption or authority is shown, the corporation is bound by a signature in such form. 7 Fletcher Cyclopedia Corporation, Sec. 3026.

In 11 C.J.S. 403 (Sec. 16) wherein is discussed the manner and form of signatures on a bond, it is stated as follows:

"Independent of any statutory requirement, the manner and form of the signature, when made, is immaterial, provided it is made by the obligor for the purpose and with the intention of binding himself. If made with this intention, the signature may consist of a mark or sign, and in some jurisdictions this rule is in effect prescribed by statute, or it may consist of a printed facsimile of the makers autograph adopted by him for that purpose, * * *."

The capacity to give a power of attorney and the general validity of such a power are essentially contractual. Hence, it is the general rule that, in the absence of a statute to the contrary, the law of the place where the contract creating the power of attorney is entered into governs questions connected therewith. Restatement of Conflicts of Law, Sec. 345; 11 Am.Jur. 371, Section 84.

Honorable Omer H. Avery

In your letter you mentioned that the agents for Travelers Insurance Company operate under powers of attorney executed by an officer of the company in the home office in Hartford, Connecticut. You further advised that the certification as to the correctness of the power of attorney bears a facsimile signature which has been authorized by the board of directors of the company. The State of Connecticut recognizes the validity of facsimile signatures. See *In re. Deep River National Bank*, 73 Conn. 341, 47 Atl. 675; *Kilday v. Schanecupp*, 91 Conn. 29, 98 Atl. 335; *Max Amos Machine Co. v. International Assn. of Machinists*, 92 Conn. 297, 102 A. 706. Therefore, as a power of attorney bearing a facsimile signature is valid in the State of Connecticut where it is executed, under the general rule mentioned hereinabove, the power of attorney would also be valid in other states.

For your information we are enclosing herewith a copy of an opinion of the Attorney General to Francis M. Cook, Regional Attorney, Department of Labor, dated September 18, 1957, in which it was held that a facsimile signature authorized by a party to a contract is binding upon such a party.

CONCLUSION

Therefore, it is the opinion of this department that a facsimile signature of an officer of a surety company certifying as to the correctness of a power of attorney is a valid signature if the officer intends it to be his signature and he has been authorized by the board of directors to use a facsimile signature and the state in which the power of attorney is executed recognizes such signatures as being valid.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Calvin K. Hamilton.

Yours very truly,

John M. Dalton
Attorney General

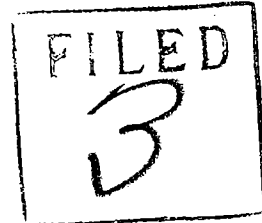
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Enc. Opinion to -
Francis M. Cook
September 18, 1951

CITY MARSHAL:
ELECTION:

A city marshal of a city of the fourth class may perform the duties enjoined upon him in the conduct of a city election although he is a candidate for re-election at such an election.

April 7, 1960



Honorable F. Neil Aschemeyer
918 Security Building
319 North Fourth Street
St. Louis 2, Missouri

Dear Mr. Aschemeyer:

Your request dated February 17, 1960, for a further opinion regarding the matter of a city marshal, who is running for re-election, taking any part in the conduct in such election, reads:

"I am very appreciative of your letter of February 15, 1960, enclosing an opinion rendered by your department on October 27, 1952, to Honorable Homer F. Williams, Prosecuting Attorney of Bollinger County, with regard to a candidate serving as election judge. I do, however, desire a specific opinion with reference to the second question which I raise, namely: Whether a city marshal running for re-election may take part in the conduct of such election as provided for by Sections 79.030, 111.050 and 129.870, RSMo 1949."

We would first direct attention to Section 79.030, VAMS, a portion of which reads:

"* * * All duties specified in the state election laws to be performed by the constable or sheriff shall be performed by the city marshal in the city elections; * * *"

Section 111.050, VAMS, reads:

"The sheriff shall attend the elections in his county and perform such duties as are enjoined on him by law, under the direction of the judges."

By Section 129.870, VAMS, we see that the city marshal is an election official at city elections. That section reads:

"As used in section 129.860 the words 'election officers,' 'election officials,' mean any precinct

Honorable F. Neil Aschemeyer

election judge or clerk, registrar of voters, county clerk, judge of county court, election commissioner, assistant election commissioner, deputy election commissioner, inspector of elections, deputy county clerk, or other assistant, employee, clerk or deputy employed in the office of the county clerk or board of election commissioners, township constable, member of board of police commissioners, or city marshal or police officer when on duty taking part in the conduct of any primary, convention, election, registration or revision of voters as required by the provisions of sections 111.420, 111.430, 111.450, 111.550, 111.560, 111.580, 111.780, and 129.850 to 129.890, RSMo 1949."

We find no prohibition, positive or implied, against either a sheriff or a city marshal from performing the duties which are laid upon him with respect to elections even though he is a candidate for re-election at such an election. In the absence of such prohibition we believe that the city marshal may so act.

CONCLUSION

It is the opinion of this department that a city marshal of a city of the fourth class may perform the duties enjoined upon him in the conduct of a city election although he is a candidate for re-election at such an election.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

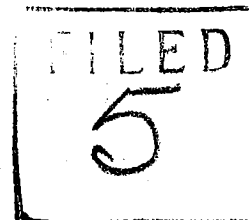
Yours very truly,

JOHN M. DALTON
Attorney General

RECEIVED

Banking: Maximum property lines of both the main banking house, and the facility to be established by authority found in House Bill No. 568, passed by the 70th General Assembly of Missouri, are to be used as termini in measuring the one thousand yards distance beyond which the authorized facility may not be separated from the main banking house.

June 13, 1960



Honorable G. H. Bates
Commissioner of Finance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Bates:

This opinion is in answer to your recent inquiry reading as follows:

"House Bill #568, passed by the 70th General Assembly provides that a 'facility' may be located not more than one thousand yards from the banking house.

"In measuring the one thousand yards is it permissible under the law to take into consideration maximum property lines of the plots on which are located the main banking house, as well as the main structure within the facility, or is the measurement to be from the main banking house to the main structure on the facility?"

House Bill No. 568, passed by the 70th General Assembly of Missouri is now found at Section 362.107 V.A.M.S., and reads as follows:

"1. Purpose of the section. It is in the public interest that banking institutions be permitted to provide convenient banking service for the large proportion of people who must come to their banks by automobile. In many communities banking institutions are so located as to prevent the establishment of convenient

Honorable G. H. Bates

facilities for automobile banking at locations attached to or immediately adjacent to their banking house. It is therefore in the interest of all the general public that banking institutions be permitted to provide automobile banking service at one conveniently located facility, separate and apart from its banking house.

"2. (1) Anything in sections 362.105 or 363.170, RSMo, or in any other law of this state to the contrary notwithstanding, every bank and every trust company organized under the laws of this state which has the corporate power to receive deposits shall have the right to, and may, upon compliance with this section, maintain and operate separate and apart from its banking house one facility for drive-in and walk-up service, whereat checks may be paid, deposits received, deposits withdrawn and change made only.

(2) No such bank or trust company may maintain or operate

(a) More than one such facility either attached to or separate and apart from its banking house at the same time excepting facilities required by the United States Government to be maintained by it as financial agent of the government on government reservations solely for military and other government personnel, provided however that nothing in this section shall be construed to authorize any bank or trust company organized under the laws of this state to establish or maintain such facilities as financial agent of the government on government reservations; or

(b) Such a facility located more than one thousand yards from its banking house; or

Honorable G. H. Bates

(c) Such a facility outside the limits of the city, town, or village or unincorporated community in which its banking house is located; or

(d) Such facility located closer than four hundred feet to the main banking house of another then existing banking institution unless such facility shall be located closer to the main banking house of the banking institution operating such facility than it is to the main banking house of any other then existing banking institution, or unless such banking institutions affected shall consent thereto in writing.

(e) Such facility separate and apart from its banking house without having first obtained the approval of the commissioner of finance of the state of Missouri.

(3) Whenever any such bank or trust company desires to maintain and operate a facility separate and apart from its banking house, pursuant to this section, or to move a facility previously established under this section to another location, it shall apply to the commissioner of finance for such authority and provide the commissioner with such relevant information as he may reasonably request. In determining whether or not to approve the application for such facility, the commissioner shall take into consideration the following facts:

(a) The convenience, needs and welfare of the people of the community and area served.

(b) The financial strength of the banking institution making application for such facility in relation to the cost of establishing and maintaining such facility.

Honorable G. H. Bates

(c) Whether other banking institutions will be seriously injured by the approval of the application for such facility at the location specified.

(4) If said commissioner of finance be not satisfied and shall deny the application, the action of said commissioner in granting or denying any such application may be appealed from and be reviewed in the same manner as action by him pursuant to section 362.040, RSMo, may be appealed from and reviewed.

(5) Nothing in this section contained shall be deemed to authorize the maintenance or operation of a branch bank or a branch trust company in contravention of the prohibition contained in sections 362.105 and 363.170, RSMo.

(6) National banking associations located in this state shall have the same, but no greater right under or by virtue of this section as banks and trust companies organized under the laws of this state."

Language contained in the statute just quoted discloses that the new law authorizes a "facility for drive-in and walk-up service." The statute does not describe the physical character to be assumed by the facility, nor does it prescribe a rule for measuring the distance of one thousand yards or the four hundred feet mentioned in the statute. The statute merely prohibits location of the facility "more than one thousand yards from its banking house."

When we note that the terms "main banking house of the banking institution" and "facility for drive-in and walk-up service" are nowhere described or defined in Section 362.107, supra, a common sense approach will have to be made in light of the purpose of the law.

Now, in order to do violence to the purpose of the law, one would have to establish a facility at a point more than one thousand yards from the main banking house. Of course,

Honorable G. H. Bates

a facility must comprehend all of its physical attributes without which it could not become an operational facility. The plots on which the facility, as well as the main banking house, are located would seem to constitute two areas vital to establishment of the facility.

If we do not let these two major factors (sites) form the termini for measuring the one thousand yards distance, we close our eyes to the fact that a part of a whole is to be ignored in determining the true character of two separate whole parts--the main banking house, and the facility to be established.

We see no apparent danger in employing maximum property lines as termini when measuring the one thousand yards distance to be maintained between the main banking house and the facility to be established, and such construction of language used in the statute avoids a strained construction of words employed, effects reasonableness and promotes the main purpose of the legislation without giving rise to hypertechnical problems which could be involved if any other course were taken.

CONCLUSION

It is the opinion of this office that maximum property lines of both the main banking house, and the facility to be established by authority found in House Bill No. 568, passed by the 70th General Assembly of Missouri, are to be used as termini in measuring the one thousand yards distance beyond which the authorized facility may not be separated from the main banking house.

The foregoing opinion which I hereby approve was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

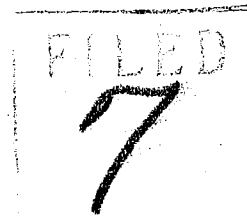
John M. Dalton
Attorney General

JLO'M:gm

ACCOUNTANCY: Firms can be registered as C.P.A.'s in Missouri if each member is resident of or engaged in practice of public accountancy in United States, is in good standing as a C.P.A. in a state, and if resident member holds Missouri C.P.A. certificate. Firm can be registered as public accountants if resident member holds Missouri certificate as C.P.A. or P.A. May practice under fictitious name if registered under fictitious name law and registered in state. May have Missouri address listed for such firm. Employees of firm not entitled to take Missouri C.P.A. examination unless firm actually practices in this state.

November 1, 1960

Honorable E. H. Berry
Treasurer
State Board of Accountancy
Sikeston, Missouri



Dear Sir:

This is in answer to your letter of recent date requesting an opinion of this office on the following facts:

There is a firm of certified public accountants in the state of Illinois which practices accountancy in such state and which has registered with the Secretary of State of Missouri under the provisions of Sections 417.200 to 417.230, the fictitious name law of Missouri. A partner in such firm lives in Clayton, Missouri, and holds a Missouri certified public accountancy certificate. Such partner has requested the State Board of Accountancy to issue a permit in the firm name at the address of such partner in a Missouri city. It is further alleged as a fact that this would permit the Illinois employees to take the Missouri certified public accountant's examination. The questions you ask are these:

"1. Where an out of state firm of accountants applies for a firm permit and the firm name shows only the names of the actual partners in practice, and one or more partners holds a Missouri P.A. or C.P.A. valid certificate, is it mandatory that we issue such firm a permit?

"2. Where an out of state firm of accountants applies for a firm permit and the firm name has been registered in Missouri under Section 417 with the Secretary of State, and one or more principals holds a Missouri P.A. or C.P.A. valid certificate, is it mandatory that we issue such firm a permit?

Honorable E. H. Barry

"3. In both of the above instances where the firm or firms have bone-fide out of state listed offices and list in Missouri only the home address of one of the partners, shall we register the firm in our annual register with an out of state office address or show the home address as its Missouri office?"

Section 326.040 provides, in part, as follows:

"1. The board shall authorize the registration, as certified public accountants, of firms and partnerships, provided it be shown to the board that:

(1) Each member or partner, of such firm or partnership, resident, or engaged in the practice of public accountancy, in the United States, is in good standing as a certified public accountant in one or more states or political subdivisions of the United States; and

(2) Either:

(a) Each resident or local member or partner is the holder of a valid certificate as a certified public accountant issued under the laws of this state; or

(b) If there be no resident or local member or partner, each resident or local manager is the holder of a valid certificate as a certified public accountant issued under the laws of this state.

* * * * *

"3. The board shall authorize the registration, as public accountants, of firms or partnerships, and issue to them permits to practice as such; provided, the resident or local partner or partners, or, if there be no resident or local partner, the resident or local manager or managers hold a valid certificate as a public accountant or as a certified public accountant issued under the laws of this state. * * *"

Honorable E. H. Berry

Under provisions of Section 326.040, supra, the Board is authorized to register firms and partnerships as certified public accountants when each member or partner, resident, or engaged in the practice of accountancy in the United States, is in good standing in a state of the United States and each resident or local member or partner is the holder of a valid C.P.A. certificate issued under the laws of Missouri. Also, a firm or partnership may be registered as public accountants if the resident or local partner or partners have a valid certificate as public accountants or certified public accountants issued under the laws of Missouri.

If a member lives out of state, he must practice in the state in order to be a "local" partner under the provisions of paragraph 4 of Section 326.040, which provides as follows:

"The term 'local,' as used herein, is intended to denote persons engaged in practicing public accountancy in this state, who spend all or the greater part of their time doing business hours in this state, but reside in another state."

However, the reference in Section 326.040, RSMo 1949, to a resident member or partner, means that a firm is entitled to be registered in the state of Missouri if a member or partner of the firm is an actual resident of this state and has a certificate issued under the laws of this state and there is no requirement that he be in the active practice of accountancy in this state. Therefore, it is our view that, under the provisions of Section 326.040, it is mandatory that the State Board of Accountancy register a firm as a public accountant or a certified public accountant when one of the partners holds a certified public accountant's certificate issued by the State of Missouri and the firm makes application to be so registered.

Section 326.210, RSMo 1949, provides, in part, as follows:

"1. Upon the application of the holder of a valid and unrevoked certified public accountant certificate, or of a valid and unrevoked public accountant certificate, issued by it, the board shall, upon payment of the fee prescribed in section 326.200, in the June following the taking effect of this law and in June of each year thereafter,

Honorable E. H. Berry

issue to the applicant a permit to practice public accountancy in this state, which, subject to this chapter and the rules enacted thereunder, shall be good until June thirtieth of the next succeeding year. Such permit may also be issued to any firm, partnership or corporation entitled to practice public accounting in this state. Interim permits may be issued to qualified applicants complying with the provisions of this chapter during the period between said prescribed dates of issue."

While the provisions of such section relating to the issuance of annual permits by the State Board of Accountancy insofar as it concerns firms states, "Such permit may also be issued to any firm," we believe that the use of the word "may" does not mean that the Board has discretion to determine whether a firm is to be issued or denied a permit but means that the Board is to issue annual permits to firms, partnerships or corporations as well as individuals. In the case of *Kansas City v. J. I. Case Threshing Mach. Co.*, 87 SW2d 195, 1.c. 205, it is stated:

"The words 'may, must and shall' are constantly used interchangeably in statutes and without regard to their literal meaning; and in each case are to be given that effect which is necessary to carry out the intention of the Legislature as determined by ordinary rules of construction. * * * 'A mandatory construction will usually be given to the word "may" where public interests are concerned and the public or third persons have a claim de jure that the power conferred should be exercised or whenever something is directed to be done for the sake of justice or the public good.' 59 C. J. 1083, § 635. * * *"

We believe the meaning of such section to be that the Board must issue an annual permit to a firm if the firm has been registered in the state of Missouri and makes the proper payment of the fee required. Paragraph 5 of Section 326.040 provides as follows:

"A firm or partnership may make use of a fictitious name, provided, the individuals

Honorable E. H. Berry

practicing under such name shall have complied with the laws of this state respecting the registry of fictitious or assumed names."

Under the provisions of such paragraph, a firm which is registered under the fictitious name law of Missouri is authorized to practice accountancy under such firm name in this state. However, the registration with the Secretary of State of Missouri of a firm name does not authorize an out-of-state firm to practice accountancy in this state merely because of such registration. A firm can practice in this state only if the conditions required for registration and issuance of annual permits are met. If a firm meets the conditions for registration and issuance of permits by Missouri, such firm is, by virtue of Section 5 of Section 326.040, authorized to practice accountancy in this state under a fictitious name if such firm has also complied with the fictitious name law in this state.

Inasmuch as a firm which has as a member or partner an individual who has been issued a Missouri certified public accountant certificate is entitled to be registered in Missouri as a public accountant or as a certified public accountant, in the circumstances above described such firm should be listed at the address in Missouri submitted by such firm. We find no authority which would authorize you to refuse to list a Missouri address when such address is submitted in the application for registration of the firm which is engaged in the practice of accountancy in another state.

However, we cannot agree that the registration of the firm would automatically permit all of the Illinois employees of such firm to take the Missouri C.P.A. examination. Section 326.060, RSMo 1949, provides as follows:

"Individuals who apply for a certificate as a certified public accountant must, except as otherwise herein provided:

- (1) Be citizens of the United States;
- (2) Be over the age of twenty-one years;
- (3) Be residents of this state, have an office therein for the regular practice of public accountancy, or be an employee of a certified public accountant or a public accountant practicing within this state."

Under the provisions of Section 326.060(3), an individual wishing to take the examination for certified public accountant in this state must be a resident of this state, have an office in the state for the regular practice of accountancy or be an employee of a firm practicing within this state. The mere fact that a firm is registered in Missouri and has been issued an

Honorable E. H. Berry

annual permit to practice accountancy in Missouri does not authorize an employee of such firm to take an examination in Missouri for a certificate as a C.P.A. Such section makes a further requirement, that is, that the firm, whether it be registered as a certified public accountant or a public accountant, actually be practicing within the state.

CONCLUSION

It is the opinion of this office that a firm is entitled to be registered as a certified public accountant in the state of Missouri if each member or partner of such firm, resident or engaged in the practice of public accountancy in the United States, is in good standing as a C.P.A. in a state of the United States, and if each resident member is the holder of a valid certificate as a certified public accountant issued under the laws of this state, and that such firm is entitled to be registered as a public accountant if the resident or local partners or members hold valid certificates as public accountants or as certified public accountants issued under the laws of this state.

It is further the opinion of this office that such firms when so registered are entitled to be issued annual permits to practice accountancy when the proper fees therefor are paid.

It is the further opinion of this office that a firm which has registered its name under the fictitious name law of this state may practice accountancy under such fictitious name in the state of Missouri.

It is further the opinion of this office that firms so registered and issued permits to practice accountancy should have listed the Missouri address submitted by such firm.

It is the further opinion of this office that an employee of such a firm is not because of such employment authorized to take an examination in Missouri for a C.P.A. certificate unless such firm is actually engaged in the practice of accountancy in this state.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, C. B. Burns, Jr.

Yours very truly,

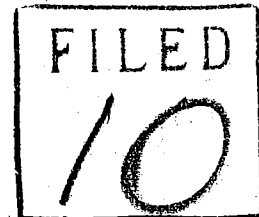
JOHN M. DALTON
Attorney General

CEB:ml

FEES:
SHERIFF'S FEES:
COURT EXPENSES:

Section 476.270, RSMo 1949, is the authorization for the payment of the three dollars allowed to a sheriff of a third class county for his attendance in a court of record or a criminal court, which may be retained by the said sheriff from the treasury of the county in which the court is held.

January 7, 1960



Honorable Gordon R. Boyer
Prosecuting Attorney
Barton County
Lamar, Missouri

Dear Mr. Boyer:

It has come to our attention by letter from Judge Edison Kaderly, October 7, 1959, that there still exists a problem with respect to your original opinion request of April 16, 1959. It is our understanding that the existing problem is with respect to who is authorized to pay the three dollar fee allowed to sheriffs for attendance in a court of record or criminal court, by Section 57.280, RSMo 1949, when, by way of example, the cases docketed for a particular day are of a criminal nature.

Section 57.280, RSMo 1949, states:

"Fees of sheriffs shall be allowed for their services as follows:

* * * * *

"For attending each court of record or criminal court and for each deputy actually employed in attendance upon such court the number of such deputies not to exceed three per day\$3.00
* * *."

As you are aware, our response to Hon. John A. Eversole, Potosi, Mo., January 3, 1947, and to Hon. Rufe Scott, Galena, Missouri, March 15, 1948, rule that the service performed by sheriffs for attending courts of record is in the nature of a civil service, and that the fees allowed for this service may be retained because they are earned in a civil matter.

Honorable Gordon R. Boyer

Section 476.270, RSMo 1949, is as follows:

"All expenditures accruing in the circuit courts, county courts, magistrate courts, and probate courts, except salaries and clerk hire which is payable by the state, shall be paid out of the treasury of the county in which the court is held in the same manner as other demands."

Although there would appear to be no Missouri case considering specifically the point about which you have asked, it is our opinion that the courts have justifiably considered the payment of this three dollar fee to be paid by the treasury of the county in which the court is held, pursuant to Section 476.270, supra.

In the case of Grouch v. Plummer, 17 Mo.Rep. 420, the court considered a statement of costs submitted by the sheriff of Newton County which, in addition to requesting the nine dollar attendance fee for the deputy sheriff, also included the request for the nine dollars to be allowed the sheriff for his attendance on the said court. Although the question in this case concerned the authorization for the deputy sheriff's collection of this fee, the court, in some general language, stated that:

"* * * The fee bill produced in this case, by the sheriff, does not come within the twenty-second section of the second article of the act concerning costs. R. C. 1845, p. 251. It was for services rendered as sheriff, not in any criminal case, but in performing general duties belonging to his office. * * *"

It is our opinion that Section 476.270, supra, is the statute which authorizes the payment of this fee from the treasury of the county in which the court is held since the fee is to be considered a fee for services rendered by the sheriff in connection with the general administration of the court.

In the case of Miller v. Boone County, 5 Ind.App.Ct.Rep. 225, 31 N.E. 1123, the court concluded that the county was liable to pay the fee authorized by statutes similar to the ones which are here involved. We believe that the reasoning of the court would be applicable and we set forth that portion of the

Honorable Gordon R. Boyer

decision which may be found at l.c. 227, 5 Ind.App.Ct.Rep. 225:

"It must be conceded that no person or body politic other than the county is chargeable with the payment of such fee, and if the latter is not liable for it the Legislature stands in the attitude of having expressly fixed a fee for the service, intending that it should not be paid. If it had been the intention of the Legislature that the sheriff should attend court without compensation, it would seem that none would have been prescribed for that service. In the distribution of powers to the county governments, the law imposes upon them the duty of maintaining the circuit courts, and requires them to provide court houses, fuel, light and other things necessary to the administration of the law. Counties, by express statute, are required to pay petit jury fees and the fees and expenses of grand juries, and they are empowered to levy and collect taxes for all such purposes. It is just as necessary to have an officer present to preserve order and enforce the rules of the court as it is to have the court room furnished, heated or lighted. The several statutes upon the subject clearly and unequivocally indicate that the Legislature intended that the expenses of all these necessary incidentals of courts should be paid by the respective counties. * * *"

It is thus our opinion that Section 476.270, RSMo 1949, is the authorization for the payment of the fee allowed the sheriff of a third class county by Section 57.280, supra, from the treasury of the county in which the court is held.

CONCLUSION

It is the opinion of this office that Section 476.270, RSMo 1949, is the authorization for the payment of the three dollars allowed to a sheriff of a third class county for his attendance in a court of record or a criminal court, which may be retained by the said sheriff, from the treasury of the county in which the court is held.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James B. Slusher.

Yours very truly,

JOHN M. DALTON
Attorney General

JBS:mc

TAXATION: A tax sale of a particular piece of property predicated upon a publication of notice of sale, which
COLLECTOR: notice listed the name of C. C. Garrett, which name was neither the name of the record owner or the name of the owner appearing on the land tax book, both of the latter being in the name of C. G. Garrett, is invalid and that upon discovery of said defect prior to the delivery of a tax deed, the collector should refuse to issue to the certificate holder a deed.

July 21, 1960

Honorable Don E. Burrell
Prosecuting Attorney
Greene County
Springfield, Missouri



Dear Mr. Burrell:

Reference is made to your request for an official opinion, which request reads as follows:

"On August 26, 1957, the county collector sold at the Court House door Tax Certificate No. 1192, covering property described as '1.86 acres E 172.5 ft W 994 ft NE 1/4 NE 1/4 north of the railroad Section 10, Township 29, Range 21, Greene County.

"On the tax sales book the property was listed in the name of C. C. Garrett, no address shown. The entry of the name was not exactly correct, since the deed showed the initials as C. G. Garrett. The property valuation as of 1955 was \$100.00.

"The purchaser of the tax certificate was Edwin J. Belknap, Route 2, Box 248B, Springfield, taxes \$26.97, purchase price \$50.00, surplus bid \$23.03.

"Mrs. Belknap has called at the office during the past week asking for a deed, at the time remarking that there was some misunderstanding as to the exact location of the property. She was sent to the assessor to check the location and the assessor advised her that the property belonged to her neighbor directly across the street, Jerome V. Carroll, Route 2, Box 248M, and was part of a tourist court and filling station.

Honorable Don E. Burrell

"In the absence of the writer, Mrs. Belknap was asked to return for further information and she did come back the same afternoon, at which time the writer asked her if she knew at the time she bought the property that it belonged to her neighbor. She replied, 'No', and showed a diagram which she had drawn just prior to the sale in the assessor's office, which diagram did not correctly show the location of the property.

"After purchase of the tax certificate the Belknaps paid taxes in 1958 and 1959, at which time the name shown on the tax statement was originally Jerome V. Carroll and this name had been scratched out by the collector's office and the Belknap name inserted as the taxpayer. Mrs. Belknap acknowledged that she had noticed that the name on the tax statement had originally been Jerome V. Carroll.

"The people who actually own this property, namely Jerome V. Carroll, were called by the collector's office and advised that apparently part of their property had been sold at a tax sale, at which time they showed considerable surprise and called at the office very shortly after the telephone message.

"It seems that all of this property, not only the part sold at the tax sale, but also the adjoining property with cabins on it, had been purchased in 1952 from C. G. Garrett and wife, the deed having been made in 1952 but apparently not delivered until June, 1956, when final payment was made on the purchase price. The deed was filed in the recorder's office in June, 1956, but this transfer having been made after the tax books for 1956 were turned over to the county clerk the new owner's name did not appear on the tax sale book or any of the original tax books for the years 1952 to 1956 inclusive.

Honorable Don E. Burrell

"In the recorder's office, there having been a long meets and bounds description, the record of transfers showed that part of the description covering the property with the cabins on it but not the part described above in the tax sale certificate, there having been noted on the recorder's books the words 'see record'. This means of recording the transfer made it difficult for the collector to ascertain in the early part of the year 1957 that the property listed in the tax sale certificate had been transferred subsequent to the making of the tax books for 1956 and prior years.

"The purchasers of this property advised the writer that they thought all the taxes had been paid, but these purchasers apparently erred; 1., In not checking the tax receipt to see if the description fully covered their property, and; 2., In apparently not having the abstract of title brought up to date at the time the deed was filed.

"At the time of the purchase there was a loan against this property with the Systematic Savings & Loan Company, and the Systematic Savings and Loan Company did pay taxes on the main part of the Motel property prior to the time the loan was paid off, and apparently they too overlooked paying all of the taxes on the two parcels of ground.

"Following notification by the collector that a portion of their property had been sold for taxes, the owners, Jerome V. Carroll, notified their attorney, James Keet, who called at the collector's office for information concerning the sale, and who advised the writer that he would offer the certificate purchaser the amount paid for the certificate plus interest in an effort to get the matter straightened out, or otherwise would probably institute suit to clear title to the purchasers, Jerome V. Carroll.

Honorable Don E. Burrell

"The collector has informed the tax certificate purchaser, Mrs. Belknap, that he would ask for legal advice before issuing a deed to this property for the reason that said collector was on notice that the entire transaction was involved in misunderstandings, some slight errors and some failure on the part of the property purchasers to take actions which would have prevented sale of the property.

"Except for the error in transcribing the initials of C. G. Garrett on the tax books, the sale of the property, the issuance of the tax sale certificate and advertising of the sale were entirely regular.

"The collector is asking for legal opinion as to his duties in view of the request of the tax sale certificate owner for a collector's deed."

We have been further supplied with the following additional information:

"This property was carried on the assessor's tax book in the name of C. G. Garrett.

"The original entry made by the assessor on the 1952 tax book was made with an addressograph plate on the automatic addressograph printing machine, and the letter 'G' on the plate evidently was somewhat worn, as it could easily be taken for the letter 'C', and was so taken by the clerks in the collector's office who transcribed the unpaid tax for the year 1952 to the back tax book and later to the tax sales book.

Honorable Don E. Burrell

"Our understanding is that Mr. Garrett sold this property in 1952, making a deed at that time which was not recorded until June, 1956, and that Mr. Garrett moved to Tulsa, Okla."

As bearing upon the issue to be here determined, we first note one of the duties of the collector in regard to the issuance of a tax deed as set forth in Section 140.540, RSMo 1949, which section provides:

"1. Whenever the county collector shall discover, prior to the conveyance of any lands sold for taxes, that the sale was for any cause whatever, invalid, he shall not convey such lands; but the purchase money and the interest thereon shall be refunded out of the county treasury to the purchaser, his representatives or assigns, on the order of the county court.

"2. Such invalid sale shall suspend for the period intervening between the date of the sale and the discovery of its invalidity the running of the statute of limitations.

"3. In such cases the county collector shall make an entry opposite to such tracts or lots in the record of certificates of purchase issued or redemption record that the same was erroneously sold, and the cause of invalidity, and such entry shall be prima facie evidence of fact therein stated. He shall notify the county clerk of such action, whose duty it shall be to make a like entry upon his sale record."

Section 13 of Article X of the Missouri Constitution provides that no real property shall be sold for taxes without judicial proceedings, unless the notice of sale shall contain the names of all record owners thereof or the names of all owners appearing on the land tax book. Said section more fully provides as follows:

"No real property shall be sold for state, county or city taxes without judicial proceedings, unless the notice of sale shall

Honorable Don E. Burrell

contain the names of all record owners thereof, or the names of all owners appearing on the land tax book, and all other information required by law."

(Emphasis ours)

Section 140.150, V.A.M.S., as amended, to conform to the requirements of the above-noted constitutional provision, provides as follows:

"1. All lands and lots on which taxes are delinquent and unpaid are subject to sale to discharge the lien for the delinquent and unpaid taxes as provided for in this chapter on the fourth Monday in August of each year.

"2. No real property shall be sold for state, county or city taxes without judicial proceedings, unless the notice of sale contains the names of all record owners thereof, or the names of all owners appearing on the land tax book and all other information required by law. Delinquent taxes, with penalty, interest and costs, may be paid to the county collector at any time before the property is sold therefor.

"3. The entry in the back tax book by the county clerk of the delinquent lands and lots constitutes a levy upon the delinquent lands and lots for the purpose of enforcing the lien of delinquent and unpaid taxes, together with penalty, interest and costs."

(Emphasis ours)

It is to be noted that prior to the 1945 Constitution, there was no requirement that the notice of sale of real property for delinquent taxes in a non-judicial proceeding contain the names of the record owners or the names of all owners appearing on the land tax book. In fact, such requirement was specifically negated by the following language: Revised Statutes 1939, Section 11125:

"It shall not be necessary to include the name of the owner, mortgagee, occupant or

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any other person, corporation owning or claiming an interest in or to any of said lands or lots in the notice of sale."

Thus, when the provisions of Section 13 of Article X of the Missouri Constitution and Section 140.150, V.A.M.S., requiring the notice of sale to contain the names of all record owners or the names of all owners appearing on the land tax book, are viewed in the light of its legislative history, the same become, we believe, vitally significant.

Section 140.170, V.A.M.S., provides for the publication of the notice of sale as follows:

"1. The county collector shall cause a copy of the list of delinquent lands and lots to be printed in some newspaper of general circulation published in the county, for three consecutive weeks, one insertion weekly, before the sale, the last insertion to be at least fifteen days prior to the fourth Monday in August.

"2. In addition to the names of all record owners or the names of all owners appearing on the land tax book it is only necessary in the printed and published list to state in the aggregate the amount of taxes, penalty, interest and cost due thereon, each year separately stated, and the land therein described shall be described in forty acre tracts or other legal subdivisions, and the lots shall be described by number, block, addition, etc., except that if a part or parts of any forty acre tract or other legal subdivision or lot are assessed on the tax books to two or more parties as owners thereof, then, as to such land or lots, such list shall be so prepared and separated.

"3. To the list shall be attached and in like manner printed and published a notice that so much of said lands and lots as are necessary to discharge the taxes, interest and charges which are due thereon at the time of sale will be sold at public auction at the courthouse door of such county, on the

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fourth Monday in August next thereafter, commencing at ten o'clock of said day and continuing from day to day thereafter until all are offered.

"4. The county collector on or before the day of sale, shall insert at the foot of the list on his record a copy of the notice and certify on his record immediately following the notice the name of the newspaper of the county in which the notice was printed and published and the dates of insertions thereof in the newspaper.

"5. The expense of such printing shall be paid out of the county treasury and shall not exceed the rate provided for in chapter 493, RSMo, relating to legal publications, notices and advertisements, and the cost of printing at the rate paid by the county shall be taxed as part of the costs of the sale of any land or lot contained in the list."

It is a well-recognized rule that in construing a statutory provision relating to the sale of land for delinquent taxes, such a provision must be strictly construed in favor of the owner of the land. This rule is stated in 61 C.J., Sec. 1519, page 1117, as follows:

"Sales of land for delinquent taxes being in derogation of private rights of property, the power has been said to be strictis-simil juris and statutes authorizing such sales must be strictly construed in favor of the owner of such land, or in so far as they are intended for the benefit, or the protection, of the citizen, and the scope of such statutes is never enlarged beyond their actual terms."

This rule has been recognized and applied by the appellate courts of this state. See Meriwether v. Overly, 228 Mo. 218, and Schlafly v. Baumann, 108 S.W.2d 363.

The following is contained in Cooley, Taxation 4th Edition, Vol. 3:

Sec. 1409, p. 2791-"A notice of sale, as required by statute is necessary to authorize

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a tax sale and the absence of the notice renders the sale void. This is one of the most important of all safeguards that have been deemed necessary to protect the interests of persons taxed and nothing can be substituted for it or excuse the failure to give it."

Sec. 1414, p. 2799-"Unusual care is required in obeying the directions of the statute regarding notice, or no one who is entitled to notice can be bound by a sale which has been made without it."

Bearing in mind the rule that the provisions of Article X, Section 13 of the Missouri Constitution and Section 140.150, V.A.M.S., relating to the inclusion of the name of the record owners or the names of all owners appearing on the land tax book and also in the notice of sale, are for the benefit of the owner, and further bearing in mind the fact that the name of the owner appearing on the land tax book was C. G. Garrett, we are of the opinion that a notice of sale relating to the particular property in question which contains the name C. C. Garrett, which name was not the name of the record owner at the time of such publication of notice of sale or the name appearing on the assessor's tax book, is not in compliance with the statutory and constitutional requirements and is therefore insufficient. It follows, we believe, that the sale, based upon said insufficient notice, is invalid and that under the provisions of Section 140.540, supra, the collector should not, under the facts presented, issue a deed to the certificate holder.

In considering this matter, we have not been unaware of the rule that a person possessing the right of redemption may do so even after the expiration of the statutory redemption period if the same is done prior to the execution and delivery of the deed. (See Wetmore v. Berger, 188 S.W.2d 949, 953). However, under the facts of this case as presented, we believe said rule would be inapplicable in view of the further rule that if the certificate holder has tendered his certificate with the amounts due, then thereafter an attempted redemption is unavailing. See Hobson v. Elmer et al., 163 S.W.2d 1020, 1023 [5].

CONCLUSION

Therefore, in the premises, it is the opinion of this office that a tax sale of a particular piece of property predicated

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upon a publication of notice of sale, which notice listed the name of C. C. Garrett, which name was neither the name of the record owner or the name of the owner appearing on the land tax book, both of the latter being in the name of C. G. Garrett, is invalid and that upon discovery of said defect prior to the delivery of a tax deed, the collector should refuse to issue to the certificate holder a deed.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Donal D. Guffey.

Very truly yours,

JOHN M. DALTON
Attorney General

DDG:mc:bw

TAX EXEMPT LAND:

A tract of land owned by the Branson Chamber of Commerce, which tract is used only for presenting a Christmas Nativity scene is used exclusively for charitable purposes and is not held for private or corporate profit and is exempt from taxation.



January 18, 1960

Honorable Clay Cantwell
Prosecuting Attorney
Taney County
Forsyth, Missouri

Dear Mr. Cantwell:

Your recent request for an official opinion reads:

"Would you please give me a ruling upon a matter of property taxation. The problem is as follows: The Branson Chamber of Commerce of Branson, Missouri holds title in that name to some real estate in Branson which is a vacant tract of ground and is used for the purpose of displaying the annual Christmas Nativity Scene in Branson.

"The Branson Chamber of Commerce is an incorporated body having received its proforma decree in the year of 1946. Is that real estate subject to taxation? There is no income derived from the real estate, and the sole use is for the purpose of displaying the Christmas Scene."

You have stated orally subsequent to writing the above letter that the real estate in question is used solely for displaying the annual Christmas Nativity Scene and that there is no financial return of any kind whatsoever from this tract of land which is owned by the Branson Chamber of Commerce which is incorporated as a nonprofit organization.

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Such being the situation, we believe that Section 137.100, Section 1 of House Bill No. 108, enacted by the 70th General Assembly, is applicable in this situation. That section reads in part:

"The following subjects are exempt from taxation for state, county or local purposes:

* * * * *

"(5) All property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable and not held for private or corporate profit, except that the exemption herein granted does not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom is used wholly for religious, educational or charitable purposes. As amended Laws 1959, p. _____, H.B. No. 108, §1."

We also note the case of Taylor v. Baldwin, 247 SW2d 741. In that case the Missouri Supreme Court stated (l.c. 749 [1-4]):

"We restate some of the basic principles within which the questions raised by appellant must be considered. 'Any gift not inconsistent with existing laws, which is promotive of science, or tends to the education, enlightenment, benefit, or amelioration of the condition of mankind, or the diffusion of useful knowledge * * * is a charity * * * and it is none the less a charity because not so denominated in the instrument which evidences the gift.' Parsons v. Childs, 345 Mo. 689, 136 SW2d 327, 330; Missouri Historical Society v. Academy of Science, 94 Mo. 459, 8 SW 346."

In discussing Section 6 of Article 10 of the Missouri Constitution and what is now subsection 5 of Section 137.100, supra, the Missouri Supreme Court in the case of St. Louis Gospel Center v. Prose, 280 SW2d 827, stated (l.c. 830):

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" * * * But in determining whether plaintiff's property is exempt from taxation under the cited constitutional and statutory provisions, supra, it is, in the main, the 'exclusive' use of the buildings for such purpose that determines the application of tax-exempting intentment. * * *"

In view of the above it is our belief that the property in question is not subject to taxation because of the fact that it is not held for private or corporate profit and is used exclusively for purely a charitable purpose.

CONCLUSION

It is the opinion of this department that a tract of land owned by the Branson Chamber of Commerce, which tract is used only for presenting a Christmas Nativity Scene is used exclusively for charitable purposes and is not held for private or corporate profit and is exempt from taxation.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

HPW:vlw

LOTTERIES: Invitation by a newspaper to the public to submit to the newspaper predictions as to the outcome of twelve basketball games, and the score of one specific game, with the offer of a prize for the person who is most successful, contains the elements of prize, chance and consideration and is, therefore, a lottery and contrary to Missouri law.

April 14, 1960



Honorable Charles M. Cable
Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Sir:

On February 20, 1960, you wrote to this department for an official opinion. Your opinion request reads:

"This office has been requested to obtain an opinion from your office relative to whether or not a basketball score contest which is run in the Daily Dunklin Democrat of Kennett, Missouri, is a lottery. Please find enclosed herewith a copy of a page from the Daily Dunklin Democrat which advertises the weekly basketball contest. This article lists the awards, contest rules, and gives an official entry blank. There are also various advertisements on the page. Also find enclosed two articles from the Daily Dunklin Democrat which we believe to be of interest in regard to this matter. You will note that the undersigned made a ruling that the contest was not a lottery, and he was going to leave it at that. Evidently, however, some misunderstanding occurred as to whether he was going to request the Attorney General's office to determine the legality of the contest; and the paper printed that he had made such a request. It would, therefore, appear that it is necessary that we do make this request at this time.

Honorable Charles M. Cable

"We would like to take this opportunity to thank you for the prompt attention and kind consideration that we know you will give this matter."

The tear sheet which you enclosed lists basketball games between Senath and Gideon; Kennett and Dexter; Holcomb and Wardell, all of which may be said to be relatively local. The other games listed are between Arkansas State and Quiney; Texas A. and M. vs. Arkansas; Cincinnati vs. Houston, Memphis State vs. Oklahoma City; Mississippi vs. Tulane; Missouri vs. Oklahoma A. and M.; St. Louis U. vs. Tulsa; Southern Illinois U. vs. Northern Illinois U.; Virginia vs. Navy.

In order to set forth the principles of law relating to lotteries in Missouri and the elements necessary to constitute a lottery, we enclose copies of the following opinions:

February 23, 1959	to	Thomas F. Eagleton
January 15, 1959	to	William C. Myers, Jr.
February 19, 1957	to	William C. Myers, Jr.
March 17, 1953	to	Douglas W. Green
September 19, 1952	to	Don Kennedy
February 4, 1943	to	Kelso Journey

From the above opinions you will observe that three elements must be present simultaneously in order to constitute a lottery, and that these elements are: prize, consideration and chance.

In the instant situation it is obvious that the element of "prize" exists since the prize for first, second and third place is \$10, \$7.50 and \$5, respectively.

It is equally obvious that the second element of "consideration" is also present. Inasmuch as the participant must acquire a copy of the paper, must spend a certain amount of time and effort in setting down his selections as to the winner of the twelve games, which selection supposedly would entail a good deal of work expended in a review of the past record of the teams engaged and an estimate of their probable chances against each other, after which the tear sheet upon which the estimates were made must be mailed back to the newspaper office or returned there in some manner. In the light of the opinions enclosed it is obvious without further belaboring this point that the element of "consideration" is present.

We have then to consider whether the element of "chance" is also present. From the opinions enclosed, and particularly from the opinion to Tom Eagleton, we note that the law of Missouri on

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this point is that there may be present in a contest some element of skill and yet, if the element of chance is greater or is dominant and the element of skill is subordinate, it will be held that the element of "chance" is present.

In the instant situation the successful contestant is the one who makes the closest correct score in forecasting the winners of twelve basketball games, and, in the event of a tie, the contestant who makes the closest estimate of the score. As we pointed out above, three of these games are local and semi-local. The other nine games are played by schools, most of which are remote from Dunklin County. Some of these contesting teams are Southern Illinois University and Northern Illinois University, Cincinnati and Houston, Arkansas State and Quincy, Memphis State and Oklahoma City. In view of these facts can it be said that the element of skill will be dominant on the part of the successful contestant? We cannot believe that it is. It is a matter of common knowledge that so-called sports experts, umpires, referees and particularly sports writers, who give all of their time and attention to sporting events and who freely and continually attempt to forecast the outcome of particular games, are very frequently in error. These people are experts in the field and yet it is common knowledge that their percentage of successful forecasts is but little, if any, greater than their errors. Certainly the great majority of contestants in the instant situation would not be experts but would simply be persons interested in the game but whose knowledge of it was but little more than superficial. We might concede the presence of the element of skill in the selections to a greater degree if the outcome of only one game were involved but in the instant contest the successful contestant must be the one who more nearly picks the winners in twelve games. The outcome of all of these games would depend, to some extent at least, upon injuries to players, health conditions of players, and many other factors even more intangible. In view of this, while we may concede that the element of skill would be present in some small degree, yet we believe that the element of "chance" is dominant. Since all of the elements necessary to constitute a lottery are present we believe that the instant operation is a lottery.

CONCLUSION.

It is the opinion of this department that the invitation by a newspaper to the public to submit to the newspaper predictions as to the outcome of twelve basketball games, and the score of one specific game, with the offer of a prize for the person who

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is most successful, contains the elements of prize, chance and consideration and is, therefore, a lottery and contrary to Missouri law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:lw:mc

Enclosures

STATE PENITENTIARY:
DEPARTMENT OF CORRECTIONS:
SHERIFFS:
CIRCUIT COURTS:

Discussion of Section 546.615, V.A.M.S., including a holding that the sheriff is required to endorse all allowable jail time on the commitment papers.



May 6, 1960

Honorable James D. Carter, Director
Department of Corrections
Capitol Building
Jefferson City, Missouri

Dear Col. Carter:

This is in response to your request of December 29, 1959, for an opinion, which request reads as follows:

"The following questions are requested answered in order for us to properly credit jail time, eliminate any friction between a sentencing court, sheriff's office and our record unit.

1. Is time spent in jail subsequent to the date of sentencing and prior to delivery to the state department of corrections to be calculated as a part of the sentence imposed, if such order is not endorsed on the commitment papers by the officer required to deliver the convicted person?

2. If subsequent jail time to the date of his sentence and prior to his delivery to the state department of corrections and the time spent by the subject in prison or jail prior to his conviction and the date on which sentence is pronounced is not made a part of the commitment document, is it deductible from the term of the sentence?

3. Is jail time deducted from the term of a sentence if the commitment papers do not have an endorsement by the delivering officer, or, the sentencing judge has not made such order a part of the document, and, the document is accompanied by an order from the court granting jail time, yet, separate from the commitment papers?

4. After the inmate is delivered to the state department of corrections a letter is received

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from the sentencing judge advising he failed to include in his records his intention to grant certain jail time and asks that a certain number of days of jail time be credited, this letter endorsed by the delivering officer. Is jail time credit in this manner received to be deductible from the imposed sentence?

5. The same question as number 4, however, the letter has not been endorsed by the delivering officer.

6. Is it compulsory that the delivering officer endorse any order pertaining to jail time, whether it be subsequent or prior to delivery?

7. Is a court order, separate from the commitment document, directed to either the Warden's office or the Records office, State Penitentiary ordering a grant of a specified number of days of jail time for a defendant sufficient evidence for allowance of jail time credit? This order not being endorsed by the delivering authority and sent to the institution several days after the commitment of the subject.

8. A defendant is held in county A for a lengthy period, succeeds in securing a change of venue and is transferred to county B where he is again held for an extended period. He eventually is taken to court, tried, convicted and sentenced. The sentencing judge incorporates in his commitment document an order for jail time, the sheriff in county B grants jail time and makes the necessary endorsement. The sentencing judge writes the sheriff in county A asking him to transmit a letter granting credit for the jail time which the defendant spent in county A prior to transfer. Is the jail time from county A creditable in this instance?

"These questions have arisen since the bill became effective and as it is our wish to comply with the law and also conform to orders properly issued from our courts it is felt that answers are necessary."

In a conversation with Warden E. V. Nash, Missouri State

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Penitentiary, subsequent to receiving the request, we were advised that the primary reason for requesting the opinion was that a number of sheriffs were taking the position that the allowance of credit for time spent in jail before and after conviction was within their discretion. Consequently, many of them are refusing to endorse on the commitment papers the time the convicted person has spent in jail subsequent to imposition of sentence and also the time spent in jail prior to imposition of sentence even though the court has, in its judgment, allowed credit for time spent in jail prior to imposition of sentence.

House Bill No. 262, 70th General Assembly, which became effective August 29, 1959, has been designated as Section 546.615, V.A.M.S., and reads as follows:

"When a person has been convicted of a criminal offense in this state

(1) The time spent by him in prison or jail subsequent to the date of his sentence and prior to his delivery to the state department of corrections shall be calculated as a part of the sentence imposed upon him; and

(2) The time spent by him in prison or jail prior to his conviction and the date on which sentence is pronounced may, in the discretion of the judge pronouncing sentence, be calculated as a part of the term of the sentence imposed upon him.

"2. When the time spent in prison or jail is calculated as a part of the term of the sentence under the provisions of subdivision 1 of this section, the time so spent in prison or jail shall, in addition to any reduction of time allowed under section 216.355, RSMo, be deducted from the term of the sentence.

"3. It is the duty of the officer required by law to deliver a convicted person to the state department of corrections to endorse upon the commitment papers the length of time spent by the person in a prison or jail subsequent to the date of his sentence and prior

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to his delivery to the state department of corrections, and if, by the terms of the sentence, the time spent in prison or jail prior to conviction and sentence is to be calculated as a part of the term, the officer shall also endorse upon the commitment papers the length of time spent in prison or jail prior to the person's conviction and sentence."

In questions 1 and 2 you inquire as to whether the time spent in jail subsequent to the date of sentence and delivery to the Department of Corrections and the time spent in jail prior to the date of sentence, if allowed by the court, is to be calculated as a part of the sentence if the time spent in jail has not been endorsed on the commitment papers by the delivering officer. In question number 6 you inquire as to whether it is compulsory that the delivering officer endorse the length of time spent in jail subsequent to the date of sentence and delivery to the Department of Corrections and the length of time spent in jail prior to sentence where the court has allowed credit for such time in its judgment.

The language used in subsection 1 under paragraph 1 of Section 546.615, supra, clearly provides that a person convicted of a criminal offense in the State of Missouri is entitled to have the time spent in jail subsequent to the date of sentence and prior to delivery to the Department of Corrections calculated as a part of the term of the sentence imposed upon him. Likewise, subsection 2 of paragraph 1 clearly provides that the court, in its discretion, may allow the time spent in jail prior to the date of imposition of sentence to be calculated as a part of the term of the sentence imposed by the court. The Department of Corrections and the sheriff are not invested with any discretion with regard to when time spent in jail shall be calculated as a part of the sentence.

As to whether it is compulsory for the delivering officer to endorse the time spent in jail upon the commitment papers depends upon the meaning given to the words "duty" and "shall" as they are used in paragraph 3 of Section 546.615, supra. This paragraph provides that it is the duty of the officer required by law to deliver a convicted person to the Department of Corrections to endorse the time spent in jail subsequent to the date of sentence imposed and where the court, in its judgment, allows credit for the time spent in jail prior to sentencing, the officer shall endorse upon the commitment papers the length of time spent in jail prior to sentencing and conviction.

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The meaning of words used in statutes are subject to the rule of construction enunciated in Section 1.090, RSMo Cum. Supp. 1957, which reads as follows:

"Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."

As a technical term of the law, "duty" signifies an obligation to do a thing. Black's Law Dictionary, Fourth Edition. A ministerial duty is a simple and definite duty imposed by law arising under conditions admitted or proved to exist and regarding which nothing is left to discretion. 67 C.J.S. 398; State ex rel. Heller vs. Thornhill, et al., 160 SW 558, 559.

The word "shall" is ordinarily imperative, operating to impose a duty which may be enforced. 82 C.J.S. 877. Black's Law Dictionary, Fourth Edition, in defining the word "shall," reads:

"As used in statutes, contracts or the like, this word is generally imperative or mandatory."

It is generally held that a statute imposing a positive duty on a public officer will be construed as mandatory. 67 C.J.S. 399. It is our opinion that paragraph 3, Section 546.615, supra, imposes a positive duty upon the officer charged by law with the delivery of convicted persons to the Department of Corrections to endorse upon the commitment papers all of the time spent in jail, both before and after sentencing, which is to be calculated as a part of the sentence. If the convicted person has no jail time which he is entitled to have calculated as a part of the sentence, the delivering officer should so endorse this fact upon the commitment papers. The delivering officer is vested with no discretion as to if and when time spent in jail is to be calculated as a part of the sentence. He is merely required by law to endorse the length of time spent in jail subsequent to imposition of sentence as well as the length of time spent in jail prior to imposition of sentence where the court has allowed such time in the judgment. When a statute requires the performance of an official duty, the right to have that duty performed continues as long as the official fails and refuses to perform such duty. 66 C.J.S. 402. We believe that the duty imposed upon the officer by paragraph 3, Section 546.615, supra, is that of performing a ministerial act which the officer may be compelled to perform through appropriate legal action.

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The request does not inquire, and we are not expressing, an opinion with respect to what civil liability, if any, an officer may incur for failure to endorse the time spent in jail upon the commitment papers. However, it is interesting to note a statement in 67 C.J.S. 422 (Section 127B) which reads as follows:

" * * *Where, however, the law imposes on the officer the performance of ministerial duties in which a private individual has a special, direct and distinctive interest, the officer is liable to such individual for any injury which he may proximately sustain in consequence of the failure to perform the duty at all, or to perform it properly * * *"

In answer to questions 4 and 5, we would advise that a court can only speak by and through its records. In re Wakefield, 274 SW2d 345, affirmed 283 SW2d 467; State ex rel. Phelps v. McQueen, 296 SW2d 85; In re Oberman's Estate, 281 SW2d 549; Cunio v. Franklin Co., 285 SW 1007. An informal letter from the trial court advising that it intended to grant jail time has no legal effect. The fact that the allowable jail time has or has not been endorsed on such a letter is of no significance.

Questions 3 and 7 relate not only to the question of the officer's endorsing the allowable jail time upon the commitment papers but also to the power or right of the sentencing court to amend the original judgment to allow a convicted person credit for the time spent in jail prior to conviction and sentencing.

The cases indicate that at one time the trial court retained control over and had the power to modify, amend, revise or vacate its judgment during the term within which it was rendered except when execution of the judgment had begun. State v. Turpin, 61 SW2d 945, 948 (9); State ex rel. Orr v. Latshaw, 237 SW 770, 771 (1); Ex parte Simpon, 300 SW 491; 24 C.J.S. 118.

It would appear that now a judgment in a criminal cause is final when entered. State v. Morrow, 316 SW2d 527, 528; State v. Parker, 310 SW2d 923, 924. Therefore, the trial court no longer has authority to amend, modify or vacate its judgment after it is entered, except as is provided by Supreme Court Rule 27.22 or to make a nunc pro tunc entry to correct an error or omission in the original judgment.

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Supreme Court Rule 27.22 provides that the court may on its own initiative arrest or set aside a judgment before the transcript is filed in the appellate court if an appeal has been taken, and in any event, not later than thirty days after entry on the grounds (1) the facts stated in the information do not constitute an offense or (2) the court is without jurisdiction of the offense. Therefore, any attempt on the part of a court to amend, modify or vacate a judgment after it has been entered has no legal effect except where the judgment is vacated on one of the grounds specified in Supreme Court Rule 27.22 or the modification is in the form of a nunc pro tunc entry. If the court, at the time it enters its judgment, orders that the convicted person be allowed credit for time spent in jail prior to sentencing, and this order of the court is omitted from the judgment when it is written up, the court may correct this omission at any time by means of a nunc pro tunc entry. However, a nunc pro tunc entry can only be employed to correct a clerical mistake and cannot be invoked to correct a mistake or oversight of the judge or to render a judgment different from that actually rendered. Aronberg v. Aronberg, 316 SW2d 675; McCarthy v. Eidson, 262 SW2d 52; Greggers v. Gleason, 29 SW2d 183. A judgment which has been corrected by the court to allow credit for the time spent in jail prior to sentencing should be endorsed by the sheriff unless the nunc pro tunc judgment specifies the number of days spent in jail prior to sentencing. If the court actually specifies in the original judgment or in the correction thereof the number of days spent in jail prior to sentencing, we are of the opinion that this should be accepted in lieu of an endorsement by the sheriff and that the number of days specified therein should be calculated as a part of the sentence.

We were advised by Warden Nash that the facts set out in question number 8 relate to an actual case. He stated that the sheriff in county "A" had endorsed the length of time spent in jail in that county prior to the change of venue on the letter he received from the judge and returned the letter to the judge. The judge then forwarded the letter bearing the endorsement of the sheriff to the Department of Corrections.

The sheriff of county "B" could not have endorsed the time spent in jail in county "A," and it would have been difficult and very inconvenient for the sheriff of county "B" to have obtained the endorsement of the sheriff in county "A" on the commitment papers. The commitment papers would have had to have been mailed or delivered to the sheriff in county "A" in some manner or else he would have had to travel to county "B" for that purpose.

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We believe that in those cases where the facts are as set out in question number 8, a letter from the sheriff, in which is set out the length of time spent in jail in the county from which the change of venue was taken, sufficiently complies with the requirements of Section 546.615, supra, and that you should accept such a letter in lieu of an endorsement on the commitment papers.

CONCLUSION

Therefore, it is the opinion of this department that:

(1) Every person convicted of a criminal offense in the State of Missouri is, by operation of law, entitled to have the time spent in jail subsequent to the date of sentencing and prior to delivery to the Department of Corrections calculated as a part of the sentence imposed upon him.

(2) Every person convicted of a criminal offense in the State of Missouri is entitled to have the time spent in jail prior to the date of sentencing calculated as a part of the sentence imposed upon him if the court so orders in its judgment.

(3) The officer required by law to deliver the convicted person to the Department of Corrections is required by Section 546.615, V.A.M.S., to endorse on the commitment papers the length of time spent in jail subsequent to the date of sentencing and prior to the date of delivery to the Department of Corrections as well as the length of time spent in jail prior to sentencing where the court has awarded credit for such time. If the convicted person has no jail time which he is entitled to have calculated as a part of the sentence, the delivering officer should so endorse this fact upon the commitment papers.

(4) As a court can only speak by and through its records, an informal letter from a judge advising that it was his intention to allow credit for time spent in jail prior to the date of sentencing has no legal effect.

(5) The trial court has no authority to amend or modify a judgment to allow credit for the length of time spent in jail prior to the date of sentencing after the judgment has been entered except to make a nunc pro tunc entry to correct an error or omission in the original judgment.

(6) In those cases where the court allows credit for the length of time spent in jail prior to the date of sentencing, and the

Honorable James D. Carter

convicted person has been confined in jail in two different counties by virtue of the fact that a change of venue was taken from the county wherein prosecution was instituted, a letter from the sheriff in the county from which the change of venue was taken, giving the number of days spent in jail in that county, is sufficient compliance with the endorsement requirements of Section 546.615, V.A.M.S.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Calvin K. Hamilton.

Yours very truly,

JOHN M. DALTON
Attorney General

CKH/mlw

MOTOR VEHICLES - HISTORIC -

May be used on highways without further registration so long as it is so used solely for exhibition and educational purposes.

September 20, 1960



Honorable Robert L. Carr
Prosecuting Attorney
Washington County
Potosi, Missouri

Dear Mr. Carr:

This is in reply to your request of September 9, 1960 for an official opinion which reads as follows:

"A number of residents of Washington County have obtained and restored automobiles more than 25 years old, the licensing of which is referred to in Section 301.131, Revised Statutes of Missouri, which refers to certain such vehicles as 'historic motor vehicles'. An inquiry has arisen concerning the occasional use for pleasure of such vehicles, and an opinion from your office on this subject will be most helpful.

"The typical situation with which we are confronted is as follows: A vehicle more than 25 years old is obtained and restored solely as a collector's item, usually as the hobby of the owner, and the vehicle is used for exhibition purposes, such as at county and state fairs. By reason of precise restoration of the vehicles, they are capable of being operated on the public highways, and the owners wish to take occasional short

Honorable Robert L. Carr

pleasure rides in their vehicles. The vehicles are kept and so used, however, as collector's items rather than as means of transportation. Assuming that the owner of such a vehicle would register his automobile under Section 301.131, as an historic vehicle, but obtain no other license for the vehicle to be operated on Missouri's highways, would the described occasional pleasure use constitute a violation of the statutes requiring the licensing of vehicles? Your assistance in this matter will be greatly appreciated."

Section 301.131, Laws of 1955, page 620, states:

"1. Any motor vehicle over twenty-five years old which is owned solely as a collector's item and which is used and intended to be used for exhibition and educational purposes shall be permanently registered upon payment of a registration fee of ten dollars. Upon the transfer of the title to any such vehicle the registration shall be cancelled and the license plates issued therefor shall be returned to the director of revenue.

"2. The owner of any such vehicle shall file an application in a form prescribed by the director, verified by affidavit, providing that such vehicle meets the requirements of this section, and a certificate of registration shall be issued therefor. Such certificate need not specify the horsepower of the motor vehicle.

"3. The director shall issue to the owner of any motor vehicle registered under this section two license plates manufactured of embossed steel, painted white with black lettering, and containing the number assigned to the registration certificate issued by the director of revenue, and the following words:

Honorable Robert L. Carr

'Historic Motor Vehicle', 'State of Missouri'.
Such license plates shall be kept securely
attached to the motor vehicle registered
hereunder."

The title to the act, as found in the Laws of 1955, page
620, reads as follows:

"AN ACT to amend chapter 301, RSMo 1949, as
amended, by inserting after section 301.130,
a new section to be known as section 301.131,
providing for the registration of motor
vehicles over twenty-five years old which are
used only for exhibition and educational pur-
poses."

Article III, Section 23, of the Missouri Constitution of
1945 reads as follows:

"No bill shall contain more than one subject
which shall be clearly expressed in its title,
except bills enacted under the third exception
in section 37 of this article and general ap-
propriation bills, which may embrace the
various subjects and accounts for which moneys
are appropriated."

This provision was interpreted in State v. Murphy, 148 S.W. 2d
527, 532 (1941) to mean "(t)hat if the title is restrictive the
Act must also be restrictive. Hunt v. Armour & Co., 356 Mo.
677, 136 S.W. 2d 312; Sherrill v. Brantley, 334 Mo. 497, 66 S.W.
2d 529."

Due to this constitutional provision and its interpretation,
Section 301.131 would have to be interpreted to read "any motor
vehicle over 25 years old which is owned solely as a collector's
item and which is used and intended to be used [only] for exhibi-
tion and educational purposes * * *."

Therefore, it would appear that the registration provided
for in Section 301.131 will allow the vehicle to be operated upon
public highways without further registration only when these
vehicles are so used for exhibition and educational purposes.

Honorable Robert L. Carr

No provision is made for the operation of this motor vehicle on the highway at any time other than while it is being used for exhibition and educational purposes. This registration would thus not enable the owner to operate the vehicle upon public highways purely for his own pleasure; it would have to be for exhibition and educational purposes.

CONCLUSION

It is the opinion of this office that historic vehicles registered under Section 301.131 may be operated upon public highways without further registration so long as they are used solely for exhibition and educational purposes.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James W. Riner.

Very truly yours,

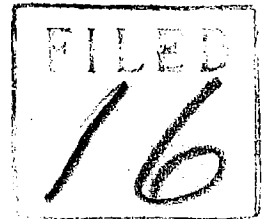
John M. Dalton
Attorney General

JWR:vlw

BRIDGES: In enactment of Sec. 229.160, RSMo 1949, requiring
PUBLIC HIGHWAYS: movers of threshing machines, sawmills, steam engines,
INJURIES TO: or gasoline tractors to lay down planks of not less
than dimensions given, on floor of a bridge before
moving any such machines thereover, and that failure to take said pre-
cautions, when resulting in injury to bridge, making mover liable in
double amount of injuries, it was legislative intent that by expressly
naming said machines all other types of machines were impliedly ex-
cluded. Diesel powered tractors and heavy machinery not within
purview of section.

March 9, 1960

Honorable Don Chapman, Jr.
Prosecuting Attorney
Livingston County
Chillicothe, Missouri



Dear Mr. Chapman:

This is to acknowledge receipt of your request for a legal
opinion which reads as follows:

"Do diesel powered tractors and heavy machinery
come within the purview of 229.160, Missouri
Revised Statute? The County Court of Livingston
County has requested that I obtain an official
opinion from you."

Section 229.160, is referred to by you in the opinion request
and said section reads as follows:

"All persons owning, controlling or managing
threshing machines, sawmills and steam engines
or gasoline tractors are required, in moving
the same over public highways to lay down
planks not less than one foot wide and three
inches in thickness on the floors of all bridges
situate on the public highways, while crossing
the same with such threshing machines, sawmills,
steam engines or gasoline tractors, and in the
event any person owning any such machinery shall
cross or attempt to cross any bridge upon any
public highway with such machinery who shall
neglect or fail to lay down said planks as a
protection to said bridge and who shall, by
reason of such neglect cause injury to any such
bridge, he shall be liable for double the
amount of such injury to be recovered in the
name of the county or any subdivision thereof,
to the use and benefit of the road and bridge
fund."

Honorable Don Chapman, Jr.

We understand said inquiry to ask if one who moves a diesel-powered tractor and heavy machinery over a bridge on a public highway is first required to lay heavy planks on the floor of the bridge for the wheels to run on while crossing the bridge. In the event a person moves said tractor or heavy machinery across the bridge without taking the statutory precautions, and by reason of his neglect, the bridge is injured, will such person be liable for double the amount of injuries to the bridge, under provisions of said section? In other words, is a diesel-powered tractor and heavy machinery included within the specific class of objects mentioned in the section?

Your question calls for a construction of Section 229.160. In attempting to arrive at the proper conclusion it will be necessary to keep the statutory rules of construction in mind, particularly that primary rule of construction which requires one to ascertain and give effect to the intention of the lawmakers from the words used in the statute under consideration, if possible, and to put upon the statutory language honestly and faithfully its plain and rational meaning to promote its object.

The manifest purpose of the lawmakers in enacting this statute was to protect the bridges on public highways against injury from heavy machinery being moved across such bridges, and to require all persons moving said machinery to take certain precautions required by the statute to avoid injury to the bridges. Persons who neglected to take such precaution before moving their machinery which resulted in injury to a bridge would be civilly liable for double the amount of injury to the bridge.

It is noted that Section 229.160, supra, is very limited in scope, in that it refers only to the kind of machinery specifically named, which is; threshing machines, sawmills, steam engines, and gasoline tractors. In attempting to determine whether or not the statute was intended to include other kinds or classes of machinery than those mentioned, such as diesel-powered tractors and heavy machinery, we must consider the statutory rule of construction of "expressio unius est exclusio alterius" which means that the express mention of one thing, person, or place implies the exclusion of another.

In the case of City of Hannibal v. Minor, 224 S.W.2d 598, the court discussed said rule and applied it to the facts in issue in the case. The defendant had been convicted in the Hannibal Court of Common Pleas of violating a city ordinance requiring the payment of a license fee for operating an automobile repair shop. At 1.c. 605, the court said:

"[6-7] A careful reading of the statute itself, Section 7451, supra, shows that the Legislature

Honorable Don Chapman, Jr.

gave to the municipalities named therein authority to tax a large number of occupations and callings and 'specially named' them separately. Among those named was 'auto wrecking shops.' When we consider that the Legislature specially named 'machine shops' and 'auto wrecking shops' but did not mention 'automobile repair shops,' the intention to exclude the last mentioned becomes clear. There is a fundamental principle of construction which has been recognized and applied from time immemorial by our courts to such questions as we have here. It is embodied in the maxim: 'Expressio unius est exclusio alterius' which means that the express mention of one thing, person or place implies the exclusion of another. The application of this principle to the question before us merely serves to emphasize the fact that the City in this case was without authority to include in its ordinance 'automobile repair shops.'

"On the entire record, it is our view that the defendant was improperly convicted because the ordinance which constituted the foundation of the prosecution was invalid and void insofar as it named an 'automobile repair shop' as a subject of taxation, there being no authority in state law to authorize such tax. The judgment of the Hannibal Court of Common Pleas is, therefore, reversed and the defendant discharged."

Applying the principles of the statutory rule of construction laid down by the court in the above mentioned case, it clearly appears to be the legislative intent that by specifically naming threshing machines, sawmills, steam engines and gasoline tractors, and by excluding all other kinds of machinery, the implication is that the latter kinds or classes of machinery were to be excluded from the operation of the statute by the lawmakers.

CONCLUSION

Therefore, it is the opinion of this office, that in the enactment of Section 229.160, RSMo 1949, requiring persons moving threshing machines, sawmills, steam engines or gasoline tractors over a

Honorable Don Chapman, Jr.

bridge on any public highway, to lay down planks of not less than the dimensions mentioned, on the bridge floor, before any such machines are moved thereover, and that a failure to take said precautions when resulting in injuries to the bridge, shall make the mover liable for double the amount of said injuries, it was the legislative intent that by expressly naming threshing machines sawmills, steam engines and gasoline tractors, all other kinds and types of machines were impliedly excluded therefrom, consequently, diesel-powered tractors and heavy machinery do not come within the purview of this section.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Paul N. Chitwood.

Yours very truly,

John M. Dalton
Attorney General

PHC:am

SHERIFFS: Sheriff of third class county has duty
COSTS: to collect from a defendant convicted
FEES: in a criminal case in magistrate court
CRIMINAL LAW: commission of 10% of costs taxed against
CRIMINAL PROCEDURE: such defendant and to pay such commission
MAGISTRATE COURT: into the county treasury.
COUNTIES:

March 21, 1960



Honorable Don M. Chapman, Jr.
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Sir:

This is in answer to your letter of recent date in which you requested an official opinion, and which letter reads as follows:

"After the fine and costs have been levied by the Magistrate Judge he issues an execution for the sheriff to collect the fines and costs. May the sheriff deduct 10% for the collections of these fines and costs, as in civil executions?"

Livingston County is a county of the third class.

We believe your inquiry to be whether or not the 10% commission provided for in Section 57.290(5), Laws of Missouri, 1953, page 386, is to be collected by the sheriff, and if so, what disposition the sheriff is to make of the moneys so collected. Section 57.290, Laws of Missouri, 1953, page 386, relates to fees and charges to be made by sheriffs in criminal cases. Section 57.290(5) provides as follows:

"These costs shall be taxed as other costs in criminal procedure immediately after conviction of any defendant in any criminal procedure. The clerk shall tax all the costs in the case against such defendant and deliver a certified copy of the same to the sheriff, who shall immediately proceed to collect such costs from the defendant, together with ten per cent on the amount of costs, so collected, as a commission for collecting the same, and

Honorable Don M. Chapman, Jr.

the clerk shall receive of such commission an amount equal to ten per cent of the fees collected and due such clerk, and the remainder of such commission shall be retained by the sheriff; provided, that in no case shall such commission be taxed against or paid either by the county or the state; provided further, that all costs, incident to the issuing and serving of writs of scire facias and of writs of fieri facias, and of attachments for witnesses of defendant, shall in no case be paid by the state, but such costs incurred under writs of fieri facias and scire facias shall be paid by the defendant and his sureties, and costs for attachments for witnesses shall be paid by such witnesses."

Such section clearly requires the sheriff to collect 10% commission on the amount of costs taxed against a defendant convicted in a criminal case, together with such costs. There is no provision in such section, or elsewhere, for the collection of a commission on fines collected by the sheriff.

Section 57.290, supra, is applicable to criminal cases generally and is, therefore, applicable to collection of costs from defendants convicted in criminal cases in magistrate courts. Section 57.290(5) provides that the clerk of the court in which the conviction was obtained shall receive of such commission collected by the sheriff an amount equal to 10% of the fees collected and due such clerk. Under date of June 20, 1947, this office rendered an official opinion to Honorable Forrest Smith, State Auditor, which opinion held that the only fee that could be collected for services of a magistrate and magistrate clerk in criminal proceedings is the fee provided in what is now Section 483.610, Laws of Missouri, 1955, page 380. Therefore, no part of the commission on costs collected by the sheriff under the provisions of Section 57.290(5) can be paid to the clerk by the sheriff.

Section 13 of Article VI of the Constitution of Missouri provides as follows:

"All state and county officers, except constables and justices of the peace,

Honorable Don M. Chapman, Jr.

charged with the investigation, arrest, prosecution, custody, care, feeding, commitment, or transportation of persons accused of or convicted of a criminal offense shall be compensated for their official services only by salaries, and any fees and charges collected by any such officers in such cases shall be paid into the general revenue fund entitled to receive the same, as provided by law. Any fees earned by any such officers in civil matters may be retained by them as provided by law."

Section 57.410, RSMo 1949, provides as follows:

"In all counties of the third and fourth classes, the sheriff shall charge and collect for and on behalf of the county every fee accruing to his office which arises out of his duties in connection with the investigation, arrest, prosecution, care, commitment and transportation of persons accused of or convicted of a criminal offense, except such criminal fees as are chargeable to the county. The sheriff may retain all fees collected by him in civil matters."

Under such constitutional and statutory provisions, fees and charges received by a sheriff for his services in connection with the investigation, arrest, prosecution, custody, care, feeding, commitment or transportation of persons accused of or convicted of a criminal offense are to be paid into the county treasury. The collection of criminal costs by the sheriff under provisions of Section 57.290(5), supra, arises out of the sheriff's duties in connection with the prosecution of persons accused and commitment of persons convicted of criminal offenses. It follows that such commission received by the sheriff on costs in criminal cases collected from defendants by the sheriff under the provisions of Section 57.290(5) is payable into the county treasury.

Honorable Don M. Chapman, Jr.

CONCLUSION

It is the opinion of this office that it is the duty of a sheriff of a county of the third class to collect from a defendant convicted in magistrate court in a criminal case a commission of 10% of the amount of the costs taxed against such defendant and to pay such commission into the county treasury.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, C. B. Burns, Jr.

Yours very truly,

JOHN M. DALTON
Attorney General

CEB:ml

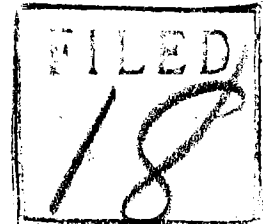
JACKSON COUNTY WATER
SUPPLY DISTRICT NO. 1:

Before any expenses are paid to directors of Jackson County Water Supply District No. 1, an itemized expense account should be submitted by each said director claiming reimbursement therefor.

March 8, 1960

12

Honorable William A. Collet
Prosecuting Attorney
Jackson County
415 East 12th Street
Kansas City 6, Missouri



Dear Sir:

Your recent request for an official opinion reads:

"A complaint has been made to this office questioning the legality of a practice followed by certain directors of the Jackson County Water Supply District No. 1. It is reported that certain directors receive a monthly check for \$10.00 for 'expenses' but no expense account vouchers for the actual items of expense claimed were submitted to the District.

"I would appreciate your advising whether Section 247.060 which provides among other things that the directors shall serve without pay, prohibits the directors from receiving an allowance 'expenses' without exact itemized vouchers being furnished the District indicating the details of the claimed expenses."

We may state first that there is no provision made specifically in the law relating to county water supply districts for the payment of expenses (Sections 247.010 through 247.220, RSMo 1949).

Section 247.060, supra, provides that the directors of such a district shall serve without pay.

However, the fact that no provision is made for expenses

Honorable William A. Collet

for directors of a county water supply district does not necessarily mean that the directors may not legitimately receive expenses. In the case of Rinehart v. Howell County, 153 S.W. 2d 381, the Missouri Supreme Court was dealing with a situation in which Homer Rinehart, Prosecuting Attorney of Howell County, filed suit for reimbursement of reasonable sums paid by him for necessary stenographic services incurred in the discharge of his official duties as prosecuting attorney of said county. At l.c. 382 (3), the court stated:

"[3] So far as presented for review, the record, viewed in the light of the judgment for respondent, is to be considered as establishing that the expenditures for which respondent asked reimbursement were for indispensable outlays for stenographic services incurred in the discharge of his official duties. Appellant offered no evidence and its brief does not question the probative value of respondent's testimony tending to establish said fact. The case is to be distinguished from cases announcing the rule that officials may not receive compensation in addition to that authorized by law. ***"

Under the same citation, the court further stated:

"[3] * * * The instant case was submitted on the theory, as disclosed by the stipulated facts and undisputed testimony, that the outlays, as contradistinguished from income, were bona fide, reasonable and actual expenditures for indispensable expenses of the office by respondent (not on the theory that compensation to an officer was involved) and falls within the ruling in Ewing v. Vernon County, 216 Mo. 681, 695, 116 S.W. 518, 522(b). That case quoted with approval a passage from 23 Am. and Eng. Ency. Law, 2d Ed., 388, to the effect that prohibitions against increasing the compensation of officers do not apply to expenses for fuel, clerk hire, stationery, lights and other office accessories and held a recorder entitled to reimbursement for outlays for necessary janitor service and stamps, stating: 'Fees are the income of an office. Outlays inherently differ. An officer's pocket in no way resembles the widow's cruse

Honorable William A. Collet

of oil. Therefore those statutes relating to fees, to an income, and the decisions of this court strictly construing those statutes, have nothing to do with this case relating to outgo.'

"[4] Appellant points out that, by Secs. 13514, 13467, 12952, and 12979, R. S. 1939, Mo.St. Ann. p. 7056, Sec. 11875, p. 7042, Sec. 11835, p. 606, Sec. 11326, and p. 613, Sec. 11353, the General Assembly authorized and established salaries for stenographic services to prosecuting attorneys in the larger counties of the State, did not provide for like services in counties of the population of Howell County, and contends for the application of the maxim expressio unius est exclusio alterius. The duties of a prosecuting attorney are many and varied. He, among other things in addition to the prosecution of criminal actions, represents the state and county in all civil cases in his county, represents generally the county in all matters of law, investigates claims against the county, draws contracts relating to the business of the county, gives legal opinions in matters of law in which the county is interested, et cetera. Sections 12942, 12944, 12945, 12947, R.S. 1939, Mo.St. Ann. pp. 600, 602, 603, 604, Secs. 11316, 11318, 11319, 11321. The legal aspect of the instant contention differs from that ordinarily encountered. Our Constitution, Art. 6, Sec. 36, Mo.St. Ann., provides: 'In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law.' In State ex rel. v. McElroy, 309 Mo. 595, 608 (II), 274 S.W. 749, 751[1], we construed said provision to authorize county courts to transact all county business and such other business as may be added to their jurisdiction by law."

Since we do not know the nature of the expenses involved in the instant case, we are unable to say whether they fall within the principle of indispensable outlays which is set forth and developed in the Rinehart case. We certainly are not justified in categorically stating that they do not come within the purview of these principles. On September 4, 1947 this department rendered an opinion, a copy of which is enclosed, to Hugh I. McSkimming, Division of Collection, Department of Revenue, in

Honorable William A. Collet

which we upheld this principle, holding the right of reimbursement for a public official for travel expense necessarily incurred in the discharge of his official duties.

Hence, we pass to the second phase of your question, to wit, whether, assuming that such expenses are legitimate and allowable, it is prerequisite to their payment that an expense account and vouchers for the actual items of expense claimed must be submitted to the district before the expense accounts are paid.

On this point we find no indication in the law relating to this matter. Neither do we find any general law which we deem to be applicable. However, we do note numbered paragraph 2 of Section 247.080, which reads:

"2. The board shall have power and it shall be its duty to employ necessary help and to contract for such professional service as the demands of the district require in creating and operating a waterworks system contemplated in this law, and shall pay out of the funds of the district available for such purposes reasonable compensation for the service rendered. It shall have made by a competent accountant an annual audit of the receipts and expenditures of the district. All persons employed shall serve for an indefinite term and at the will of the board, and party politics shall not enter into the selection of employees."

It will be noted that the requirement there is that an annual audit be made by a competent accountant of the receipts and expenditures of the district. It would be difficult for us to comprehend how such an audit as is contemplated herein could be made without an itemization of expenses. In the case of *State v. Thompson*, 85 S.W. 2d 594, at l.c. 599 (6), the Missouri Supreme Court stated:

"[6] * * * The word 'audit,' as used in the statute (Mo.St.Ann. §13799, p. 7782), specifically dealing with the commissioners, was used in the sense of inquiring into, hearing evidence upon, adjusting, correcting, and settling the details of the work, and its conformity with the orders given, and to determining the correctness of the charges

Honorable William A. Collet

made for the various items thereof and for the aggregate, and to certify the correct result on the whole to the auditor for his official acts in regard to the claims.***"

In the case of Application of Sullivan, 78 N.E. 2d 467, the Supreme Court of New York stated that the meaning of the word "audit" was to be ascertained from all surrounding facts and purposes to be accomplished, it being sometimes restricted in meaning to a checkup of correctness of the account or claim and at other times embracing not only an examination of accounts and a comparison of charges with vouchers, but also an allowance or rejection of charges.

We have noted above that in the light of the Rinehart case, some expenses are allowable although not specifically provided for. The implication which is carried by the Rinehart case is that there are other categories of "expenses" which, in the lack of specific authorization, are not legitimate and allowable. In the instant situation, if there were no itemization it would be impossible to determine whether or not these expenses were or were not allowable. We believe, therefore, that they should be itemized.

CONCLUSION

It is the opinion of this department that before any expenses are paid to directors of Jackson County Water Supply District No. 1 an itemized expense account should be submitted by each director claiming reimbursement therefor.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

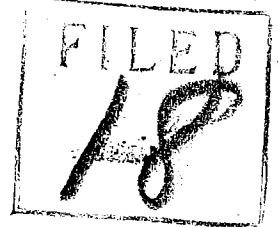
HPW:mc

Enclosure

TAX LEVY:
COUNTY JAIL:

A proposition submitted to the voters of Dade County at the election to be held November 8, 1960, to increase the constitutional tax rate 10 cents on the one hundred dollars valuation, if such proposition receives the required vote that it would be legal for the county court to proceed to build the jail from the proceeds acquired by the additional tax.

October 31, 1960



Mr. J. W. Colley
Prosecuting Attorney
Dade County
Greenfield, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"The following petition has been signed by more than 10% of the qualified voters of Dade County and has been filed with the County Court of Dade County, Missouri.

'We the following signed qualified voters of Dade County, Missouri, respectfully petition the Honorable County Court of Dade County, Missouri, to submit a proposition for the increase of the constitutional tax rate, for the purpose of building a County Jail and Residence for the Sheriff, of ten cents on the hundred dollars valuation for a period of time, not to exceed four (4) years.

Said proposition to be submitted to the voters of Dade County, Missouri, at the next regular election, to be held on November 8, 1960.'

The County Court has asked me to write you and inquire if, at the election on November 8, this proposition carries by 2/3's vote, would it be legal for the County Court to go ahead and build a Jail here in Dade County, Missouri, from the proceeds acquired by this additional tax?

It seems to me as if this question is covered by Sec. 137.065, however, the Court seems to want your opinion on this matter."

Mr. J. W. Colley

Section 137.065, RSMo 1949, reads:

"Limit of county taxes -- increase -- special election -- ballot -- notice --.

1. For county purposes the annual tax on property, not including taxes for the payment of valid bonded indebtedness or renewal bonds issued in lieu thereof, shall not exceed the rates herein specified: In counties having three hundred million dollars or more assessed valuation the rates shall not exceed thirty-five cents on the hundred dollars assessed valuation; and in counties having less than three hundred million dollars assessed valuation the rate shall not exceed fifty cents; provided, that in any county the maximum rates of taxation as herein limited may be increased for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors of the county voting thereon shall vote therefor.

2. County courts are hereby authorized to call and conduct a special election under the laws governing such election for the purpose of increasing maximum tax rates herein specified, or to submit a proposition for the increase of such rates at any regular election, and shall submit any such proposition at either a special or regular election when petitioned therefor by not less than ten per cent of the qualified voters of the county as determined by the total vote cast for governor in the last preceding general election for governor, and the proposition shall be as follows on the ballot: 'For a levy for county purposes of on the hundred dollars valuation' and 'Against a levy for county purposes of on the hundred dollars valuation.'

3. Special elections called under the provisions of this section shall be limited to one election for each twelve month period.

4. The county court shall publish a notice of said election in some newspaper published in said county in the following manner: If a daily paper, for seven successive days, and if a weekly newspaper, in two issues thereof, and the election shall be held not less than five, nor more than ten days, from the last insertion thereof; provided,

Mr. J. W. Colley:

that in all counties having a board of election commissioners such election when called by the county court shall be conducted by the board of election commissioners as provided by law. (11046, A. L. 1943 p. 1008, A. L. 1945 p. 1778, A. L. 1947 V. I p 539, A. L. 1947 V. II p. 422)"

We next call attention to Section 49.310, RSMo 1949, which reads:

"County court may erect and maintain courthouse, jail, etc. -- issue bonds. -- The county court in each county in this state shall erect and maintain at the established seat of justice a good and sufficient courthouse, jail and necessary fireproof buildings for the preservation of the records of the county. In pursuance of the authority herein delegated to the county courts, said county courts may acquire a site, construct, reconstruct, remodel, repair, maintain and equip said courthouse and jail and in counties wherein more than one place is provided by law for holding of court, the county court may buy and equip or acquire a site and construct a building or buildings to be used as a courthouse and jail, and may remodel, repair, maintain and equip such building in said place or places. The county court may issue bonds as provided by the general law covering the issuance of bonds by counties for the purposes set forth in this section. In bond elections for the aforesaid purposes in counties wherein more than one place is provided by law for holding of court, a separate ballot question may be submitted covering proposed expenditures in each separate site described therein, or a single ballot question may be submitted covering proposed expenditures at more than one site, if the amount of said proposed expenditures at each of said sites is specifically set out therein. (13702, A. L. 1945 p. 1399)"

In view of the above it would appear that if the proposition for the increase in tax rate does receive the necessary vote in the November election that it would be legal for the county court to build the proposed jail.

CONCLUSION

It is the opinion of this department that a proposition submitted to the voters of Dade County at the election to be held November 8, 1960, to increase the constitutional tax rate 10 cents on the one hundred dollars valuation, if such proposition receives the required vote that it would be legal for the county court to

Mr. J. W. Colley:

proceed to build the jail from the proceeds acquired by the additional tax.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:ms

MOTOR VEHICLES: Registration and licensing provisions apply to motor vehicles owned by not-for-profit educational institutions.

May 12, 1960

Honorable Clifford Crouch
State Representative
Taney County
Forsyth, Missouri



Dear Mr. Crouch:

We have received your request for an opinion of this office, which request reads as follows:

"I have been requested by officials of the School of the Ozarks to obtain from you an opinion as to whether the motor vehicles owned by said school, and operated intra-state, are required by law to bear Missouri State licenses. As you know the School is a Not-for-Profit Organization and is an educational institution.

"I am informed that this question arose in view of your opinion regarding tax exemption of the land on which the Adoration Scene is located."

The registration and licensing of motor vehicles in Missouri is governed by Chapter 301, V.A.M.S. Section 301.020 provides that registration shall be made by "Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, except as herein otherwise expressly provided * * *." The only express exemption from the registration and licensing provision found in Chapter 301 is in Section 301.260 which exempts motor vehicles owned by municipalities, counties, and other political subdivisions of the state. There is a further exemption applicable to motor vehicles owned by a school district and reading as follows:

Honorable Clifford Crouch

"* * * Provided, further that when any motor vehicle is owned and operated exclusively by any school district and used solely for transportation of school children, the commissioner shall assign to each of such motor vehicles two plates bearing the words 'School Bus, State of Missouri, car no.' (with the number inserted thereon), which plates shall be displayed on such motor vehicles when they are being used on the highways. * * *"

You state that the School of the Ozarks is a not-for-profit educational organization. It is not a political subdivision of the state nor is it a school district within the meaning of Section 301.260. Therefore, we conclude that there is no exemption applicable to vehicles owned by such organization.

In your opinion request you refer to the opinion of this office in which we concluded that land on which the Adoration Scene at Branson is located is exempt from tax. That opinion was based on the constitutional provision exempting property from taxation found in Section 6 of Article X of the Constitution of Missouri, 1945, and Section 137.100, V.A.M.S., enacted pursuant thereto. The constitutional provision, however, applies only to exemption from property taxes. State ex rel. Fath v. Henderson, 160 Mo. 190, 60 S.W. 1093. The motor vehicle registration fee is not a property tax but is a measure to exact revenue for the privilege of operating motor vehicles on the highways of the state. State ex rel. McClung v. Becker, 288 Mo. 607, 233 S.W. 54. Therefore, the constitutional exemption applicable to property held for educational purposes by not-for-profit corporations does not provide any exemption from the motor vehicle registration law.

CONCLUSION.

Therefore, it is the opinion of this office that motor vehicles owned by a not-for-profit educational institution are subject to the Missouri motor vehicle registration and licensing statutes when operated on the highways of this state.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Very truly yours,

JOHN M. DALTON
Attorney General

FICTITIOUS NAMES: It is proper and legal for James S. Kemper &
CORPORATION: Company to register as "Associated Mutuals,"
SECRETARY OF STATE: for the purpose of engaging in or transacting
business in the State of Missouri, pursuant
to Secs. 417.200 through 417.230, RSMo 1949,
and Sec. 351.110, par. 2, RSMo 1949, does not
vest the Secretary of State with such discre-
tion which would permit him to refrain from
registering James S. Kemper & Company as
"Associated Mutuals" under the fictitious
names laws.

July 13, 1960



Honorable Robert W. Crawford
Secretary of State
Capitol Building
Jefferson City, Missouri

Dear Mr. Crawford:

This is in response to your letter of April 26, 1960, in
which you state the following circumstances and question:

"James S. Kemper & Company is a business corporation organized in the State of Delaware and admitted to do business in Missouri on March 17, 1960. This corporation is an insurance broker, brokering primarily insurance contracts of four mutual insurance companies. The aforesaid corporation has now presented for filing to this department a Fictitious Name Registration whereby James S. Kemper & Company, a corporation, proposes to transact business in Missouri under the name 'Associated Mutuals'. In view of the fact that James S. Kemper & Company is a profit corporation and not a mutual company, and in view of the provisions of Section 351.110, paragraph (2), your opinion is respectfully requested as to the propriety and legality of the Fictitious Name Registration, whereby the business corporation would hold itself out to the public and do business as a mutual organization."

Sections 351.110, 417.200 and 417.230, RSMo 1949, read, respectively, as follows:

Section 351.110: "The corporate name
"(1) Shall contain the word 'corporation,'
'company,' incorporated,' or 'limited,'

or shall end with an abbreviation of one of said words;

"(2) Shall not contain any word or phrase which indicates or implies that it is organized for any purpose other than a purpose for which corporations may be organized under this chapter;

"(3) Shall not be same as, or deceptively similar to, the name of any domestic corporation existing under any law of this state or any foreign corporation authorized to transact business in this state, or a name the exclusive right to which is, at the time, reserved in the manner provided in this chapter."

Sec. 417.200.

"That every name under which any person shall do or transact any business in this state, other than the true name of such person, is hereby declared to be a fictitious name, and it shall be unlawful for any person to engage in or transact any business in this state under a fictitious name without first registering same with the secretary of state as herein required."

Sec. 417.230.

"Any person who shall engage in or transact any business in this state under a fictitious name, as in sections 417.200 to 417.230 defined, without registering such name as herein required, shall be deemed guilty of a misdemeanor."

In reaching our conclusion we would first bring to your attention the fact that Section 351.110, RSMo 1949, is a part of Chapter 351, which pertains to and authorizes the organization and existence of certain corporations in the State of Missouri. When referring to the "corporate name," it is our understanding that this reference is to the name of the corporation as it is originally organized or registered in the State of Missouri. This would not necessarily mean the name under or by which it conducts its business within the state. So it would appear to be the purpose of Section 351.110, paragraph 2, supra, to preclude the organizational name of a corporation from containing a name, word or phrase which indicates or implies that it is organized for any purpose other than a purpose for which corporation may be organized under Chapter 351. We feel that this has no connection with the fictitious names laws, which are found in Chapter 417, RSMo 1949.

Honorable Robert W. Crawford

You will observe from Section 417.200, RSMo 1949, that it is every name under which any person shall do or transact any business in this state, other than the true name of such person, which is to be declared a fictitious name and which must be registered before business may be transacted in this state. This section would appear to be consistent with Section 351.110, in that Section 417.200 excepts to the requirement of registration the true name of the "person" involved.

Section 417.230, RSMo 1949, makes it a misdemeanor for any person to engage in or transact any business in this state under a fictitious name without registering that fictitious name as is required by these sections. Therefore, it would appear that there is no discretion vested in the Secretary of State which would permit him to refrain from registering a fictitious name if that fictitious name is tendered for registration. The registration of the fictitious name is permitted by law. Section 417.230, RSMo 1949, makes it unlawful to engage in or transact business in this state if the fictitious name of the business has not been registered.

From the facts which you set forth we would conclude that James S. Kemper & Company is a business corporation, organized in the State of Delaware, and admitted to do business here in Missouri pursuant to the laws set forth in Chapter 351, RSMo 1949. We would conclude that Section 351.110, paragraph 2, as set forth above would be applicable to the organizational name of "James S. Kemper & Company." We would also conclude that James S. Kemper & Company may register under the fictitious names sections as "Associated Mutuals," and so long as it complies with Sections 417.200 through 417.230, the Secretary of State has no discretion to prevent such registration of James S. Kemper & Company as "Associated Mutuals."

CONCLUSION

It is the conclusion of this office that it would be proper and legal for James S. Kemper & Company to register as "Associated Mutuals," for the purpose of engaging in or transacting business in the State of Missouri, pursuant to Sections 417.200 through 417.230, RSMo 1949, and that Section 351.110, paragraph 2, RSMo 1949, does not vest the Secretary of State with such discretion which would permit him to refrain from registering James S. Kemper & Company as "Associated Mutuals" under the fictitious names laws.

The foregoing opinion, which I hereby approve was prepared by my assistant, James B. Slusher.

Very truly yours,

JOHN M. DALTON
Attorney General

EMINENT DOMAIN:
CITIES, TOWNS AND
VILLAGES:

Incorporated towns or villages have, by the terms of Section 80.090, RSMo 1949, the power of eminent domain to condemn land for the purpose of location and laying out of streets. Section 71.340, RSMo 1949, does not grant any powers of eminent domain, nor does it extend the powers granted under Section 80.090, RSMo outside the corporate limits of the town or village.

January 5, 1960



Honorable E. Gary Davidson
Member, Missouri Senate
15th District
300 North Gore Avenue
Webster Groves 19, Missouri

Dear Mr. Davidson:

This is in reply to your letter of November 10, 1959, requesting information as to the power of eminent domain of incorporated towns and villages. Your inquiry reads:

"A couple of questions concerning the power of eminent domain of incorporated towns and villages have arisen in St. Louis County. I would greatly appreciate your opinion on these matters and hereby request the same:

"a. Does an incorporated village or town have the power of eminent domain to condemn land for the location and construction of a new street within the village or town under Subsections (30) and (33) of 80.090, Mo. R.S., 1949; or under any other power?

"b. Does an incorporated village or town have the power of eminent domain to condemn land for the location and construction of a new street leading to such village or town in the adjacent unincorporated territory a distance of five (5) miles from the limits of such village or town under 71.340 Mo. R.S., 1949?"

As to the power of incorporated towns and villages, before assertion of any power by the town's governing body, it must be able to point to the source of its authority. The general rule is stated in *Krug v. Village of Mary Ridge*, 271 S.W. 2d 867, 1.c. 870, as follows:

Honorable E. Gary Davidson

"Incorporated villages possess no powers other than those granted by the lawmaking power of the state either in express terms or by necessary implication."

Chapter 88 of the Revised Statutes of Missouri, 1949, governs condemnation and the modes of procedure for the exercise of the power of eminent domain by cities of all classes in this state. This chapter of our statutes is, however, silent as to incorporated villages or towns. Consequently, the power of eminent domain, if it is to be exerted by a town or village for the establishment and construction of new streets, must be specifically set forth or necessarily implied elsewhere in the laws pertaining to powers of towns and villages.

We turn now to Section 80.090, RSMo 1949, and question a. of your letter. Section 80.090 reads, in part:

"Such board of trustees shall have power:
* * * * *

"(30) To locate and lay out new streets and alleys;
* * * * *

"(33) To widen streets heretofore laid out in such town, and to appoint three commissioners to assess the damages done to property upon which such street or alley may be located, deducting from such damages the amount of benefit, if any, such street or alley, or the widening thereof, may be to the same; but all assessments so made by the commissioners shall be reported, as soon as may be, to the board of trustees, who may approve or reject the same; and all persons aggrieved by such assessment may, within fifteen days after receiving notice of such assessment, appeal therefrom to the next circuit court of the county, by giving notice of such appeal to said board of trustees at least fifteen days before the first day of the term to which said appeal is taken; and the circuit court, on such appeal, shall be possessed of the case and proceed therewith to final judgment, according to law. In all cases of assessment or appeal, the land to be used for or occupied by the street or alley may be taken possession of for the purpose of establishing and improving such street or alley, as soon as the amount of damages so assessed shall be tendered to the owner; * * * * *

Honorable E. Gary Davidson

This power has been passed upon and construed by our courts as giving a town or village the power of eminent domain to condemn land necessary for the location of streets or alleys. In Hart vs. Bothe et al., 247 S.W. 256, 1.c. 256, 257, the St. Louis Court of Appeals stated:

"It appears that on July 17, 1920, the trustees of the village of Old Monroe passed an ordinance providing for the opening of an alley across plaintiff's land, from a point at the southern terminus of an alley in block 5 of said village, and extending southwardly to the bank of Cuivre river. This ordinance was in due and regular form, and was enacted strictly in conformity to the provisions of section 8547, R.S. 1919.

"[1] Counsel for plaintiff contend that the acts and proceedings of the board of trustees of the village of Old Monroe in enacting said ordinance are void, on the ground that said section 8547 is in conflict with sections 20, 21, and 30 of article 2 of the Constitution of this state. Inasmuch as the transfer of this case by the Supreme Court to this court determined the fact that no constitutional question is involved in this case, we rule the point against plaintiff. * * * * *

"* * * * *The necessity or expediency of opening a street or alley, where its use is to be a public one, is not a subject of judicial inquiry. It was therefore for the trustees of the village of Old Monroe, and not the courts, to say whether there was a public necessity for the opening of the alley in question. * * * * *

The wording of former section 8547, RSMo 1919, considered by the Court in that case is exactly the same as the present section 80.090, RSMo, as to town or village board of trustees' power to establish streets and alleys. In view of the pronouncement by our court that towns and villages do have the power of eminent domain in this instance, we need linger no longer upon question a. of your inquiry and turn next to question b., or the scope of powers given to towns and villages by Section 71.340, RSMo 1949. This section reads:

"The mayor and city council of any city or the chairman and board of trustees of any incorporated town or village shall have the power to annually appropriate and pay out

Honorable E. Gary Davidson

of the treasury of such city or incorporated town or village a sum of money, not to exceed ten per cent of the annual general revenue thereof, for the purpose of constructing, building, repairing, working, grading or macadamizing any public road, street and highway and any bridge thereon leading to and from such city or incorporated town or village; and such appropriation shall be made by ordinance and the money so appropriated shall be applied under the supervision and direction of the engineers of such city or incorporated town or village, and of the county highway engineer of the county in which such city, town or village is located, or of some competent person selected by such city, town or village and approved by the county highway engineer, who shall make a report thereof, in writing, to the mayor and city council of such city, or to the chairman and board of trustees of such incorporated town or village; but this privilege shall not extend to a greater distance than five miles from the corporate limits of such city, town or village, and shall not be construed so as to allow any obstruction to or interference with the free use of any such public road, street or highway by the public, except so far as may be necessary while such work is being done, and further shall not be construed to affect the liability of such city, town or village, which liability shall be the same as if such roads, streets and highways were inside the city limits."

Where the power of eminent domain is sought to be invoked, the basis of that power must be clearly granted or necessarily implied from the terms of the statute itself. In *State ex rel. Missouri Water Company v. Bostian*, 365 Mo. 228, 280 S.W. 2d 663, our Supreme Court stated the rule, 1.c. 666:

"Statutes granting the right of eminent domain are to be strictly construed. The rule is well settled in this state. The right is not to be implied or inferred from vague or doubtful language but must be clearly given in express terms or by necessary implication. *State ex rel. Cranfill v. Smith*, 330 Mo. 252, 257, 48 S.W. 2d 891, 893, 81 A.L.R. 1066; *Southwest Missouri Light Co. v. Scheurich*,

Honorable E. Gary Davidson

174 Mo. 235, 241, 73 S.W. 496, 497; Houck v. Little River Drainage Dist., 343 Mo. 28, 37, 119 S.W. 2d 826, 831; 18 Am. Jur., Eminent Domain, Sec. 26, p. 650. In applying the rule, statutes granting the power to take private property for public use are strictly construed against those who seek to avail themselves of the benefit of such statutes and the power is not to be extended beyond the plain provisions of the statute relied upon. * * * *

Section 71.340, RSMo grants the city council or town board of trustees power to appropriate and pay out of the city treasury money for the purposes of "constructing, building, repairing, working, grading or macadamizing any public road, street, and highway." This section further determines as to these funds, their manner of appropriation, the limits of appropriation and the manner of expenditure of these funds once appropriated. There is no provision made within this section for the purchase of land whereas in Section 80.090, RSMo provision is made for compensation of property owners.

Compensation of property owners for property taken through exercise of the power of eminent domain is a constitutional requirement in this state. See in this connection Section 26, Article I, Missouri Constitution, 1945.

CONCLUSION

An incorporated town or village has the power of eminent domain to condemn land necessary for new streets by virtue of the terms of Section 80.090, RSMo, granting the town's board of trustees authority to locate and lay out new streets and alleys. There is no power of eminent domain given to towns and villages under the terms of Section 71.340, RSMo. Consequently, the powers of eminent domain granted to towns and villages under the terms of Section 80.090, RSMo are confined to the area of the town or village itself and do not extend outside its boundaries.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Jerry B. Buxton.

Yours very truly,

John M. Dalton
Attorney General

COMPACT ON MENTAL HEALTH:

Responsibility for payment of the cost of maintenance and care of an indigent resident of Missouri transferred to a Missouri State Hospital from another state where the Missouri county of residence is determinable rests upon such county; that where such county of residence cannot be determined, the cost of such maintenance is upon the Missouri State Hospital to which such patient has been committed.

Where a nonresident of Missouri is accepted under the provision of the Interstate Compact on Mental Health for treatment in a Missouri State Hospital that the cost of such care and maintenance should be paid out of appropriations made to the Division of Mental Diseases of the Department of Public Health and Welfare.

January 11, 1960

Honorable Addison M. Duval, M.D.
Director, Division of Mental Diseases
State Office Building
Jefferson City, Missouri



Dear Mr. Duval:

On October 6, 1959, you wrote to this office for an opinion request supplementary to a prior request by you. Your supplementary request reads:

"1. Who is responsible for payment of the cost of maintenance and care of an indigent resident of Missouri transferred to a Missouri state hospital from another state (a) where the county of residence is determinable, or (b) where the county of residence cannot be determined?

"2. In an instance where a non-resident of Missouri is accepted under the Compact for treatment in a Missouri state hospital, is it proper to pay to such hospital the cost of care and maintenance from moneys appropriated to effect the Missouri Interstate Mental Health Compact as provided in Section 4, Article 14?"

Our answer to your question 1(a) is that the cost of maintenance, in instances where the county of residence is determinable, is upon such county.

In the situation which you set forth there is no question of the patient being a patient of any institution other than the Missouri institution, after his transfer to the Missouri institution has been effected. Subsection (a) of Article VII of Section 1,

Honorable Addison M. Duval, M.D.

H.B. 47, 70th General Assembly, Section 202.880 V.A.M.S. provides:

"No person shall be deemed a patient of more than one institution at any given time. Completion of transfer of any patient to an institution in a receiving state shall have the effect of making the person a patient of the institution in the receiving state."

We have, however, a situation in which a resident of a Missouri county is a patient in a Missouri mental hospital. This department has held that in such a situation the cost of maintenance is upon the county of residence. We so held in an opinion rendered May 31, 1956, to Hon. James L. Paul, Prosecuting Attorney of McDonald County, a copy of which is enclosed.

Your question 1(b) is where responsibility for maintenance lies in instances where the county of residence cannot be determined. In such a situation it is obvious that the cost must ultimately be borne by the State of Missouri since there is no other source to bear such cost. We believe in this instance that it is clear that such cost would be borne by the state hospital to which the patient in question has been committed, out of the appropriation made for the operation of the state hospital, which of course, is an agency of the state of Missouri. We so held in an opinion rendered April 25, 1946 to Dr. W. J. Cremer, a copy of which opinion is enclosed.

We believe that the answer to question 2 is that in the situation set forth in such question it is proper to pay to the hospital in which such patient is maintained the cost of maintenance from moneys appropriated to effectuate the Missouri Interstate Mental Health Compact as provided in Section 202.887 V.A.M.S. This section reads:

"All expenditures necessitated under the provisions of this act shall be paid out of the appropriations made to the Division of Mental Diseases of the Department of Public Health and Welfare."

Obviously the expenditure in the instant situation is one which is "necessitated under the provisions of this act . . ."

CONCLUSION

It is the opinion of this department that responsibility for payment of the cost of maintenance and care of an indigent resident

Honorable Addison M. Duval, M.D.

of Missouri transferred to a Missouri state hospital from another state where the Missouri county of residence is determinable rests upon such county; that where such county of residence cannot be determined, the cost of such maintenance is upon the Missouri state hospital to which such patient has been committed.

It is the further opinion of this department that where a nonresident of Missouri is accepted under the provision of the Interstate Compact on Mental Health for treatment in a Missouri state hospital that the cost of such care and maintenance should be paid out of appropriations made to the Division of Mental Diseases of the Department of Public Health and Welfare.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

HPW:ar,vlw

Enclosures

INTERSTATE COMPACT ON MENTAL HEALTH: Missouri Interstate Mental Health Compact funds may not be used to transfer from a Missouri State Hospital a resident of a non-Compact state who has come into Missouri as an escapee from a state hospital of another state.

A resident of a compact state who is under Missouri commitment to a Missouri State Hospital as an emergency admission may not be transferred by the Missouri Compact Administrator to the patient's own state through use of Missouri Compact funds in the absence of a clinical determination that the best interests of the patient would be served by such transfer.

January 11, 1960

Hon. Addison M. Duval, M. D.
Director, Division of Mental Diseases
State Office Building
Jefferson City, Missouri



Dear Dr. Duval:

On December 21, 1959, you wrote to this department for an official opinion as follows:

"Under date of October 6, 1959, I presented for your consideration two supplemental questions dealing with the Interstate Mental Health Compact.

"I would like to add two additional questions on this matter as follows:

1. May Missouri Interstate Mental Health Compact funds be used in returning from a Missouri state hospital to a non-Compact state a resident of that state who is on escape from a state hospital in that state?

2. May a resident of a Compact state who is under Missouri commitment to a Missouri state hospital as an emergency admission be transferred by the Missouri Compact Administrator to the patient's own state through use of Missouri Compact funds in the absence of a clinical determination that the best interest of the patient would be served by such transfer?

"Your early opinion concerning these four supplemental questions will be greatly appreciated as these matters are most urgent."

Our answer to your first question would be in the negative since we nowhere find in the Interstate Compact on Mental Health (House Bill No. 47, 70th General Assembly) any provision for the expenditure of funds appropriated to effectuate the compact for the benefit of any state not a member of the compact.

Hon. Addison M. Duval, M. D.

Your second question is whether, in the absence of a clinical determination that the best interest of a patient would be served, a resident of a compact state who has been committed to a Missouri State Hospital as an emergency admission be transferred by the Missouri Compact Administrator to the patient's own state through use of Missouri Compact Funds.

Our answer to that question is in the negative. We believe that this matter is determined by paragraph (b) of Article III of the Interstate Compact on Mental Health (House Bill #47, 70th General Assembly) reads in part:

"The provisions of paragraph (a) of this article to the contrary notwithstanding, any patient may be transferred to an institution in another state whenever there are factors based upon clinical determinations indicating that the care and treatment of said patient would be facilitated or improved thereby.* * *"

The same intent with respect to transfer is to be found in paragraphs (a) and (b) of Article IV of the Interstate Compact on Mental Health, and elsewhere in the compact.

CONCLUSION

It is the opinion of this department that Missouri Interstate Mental Health Compact funds may not be used to transfer from a Missouri State Hospital a resident of a non-Compact state who has come into Missouri as an escapee from a state hospital of another state.

It is the further opinion of this department that a resident of a Compact state who is under Missouri commitment to a Missouri State Hospital as an emergency admission may not be transferred by the Missouri Compact Administrator to the patient's own state through use of Missouri Compact funds in the absence of a clinical determination that the best interests of the patient would be served by such transfer.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:ar

STATE SCHOOLS: Senate Bill No. 93, enacted by the 70th General
PRIVATE PATIENTS: Assembly is applicable to a patient in a state
PATIENT SUPPORT: school who was admitted prior to the effective
date of such Senate Bill, and who has now
attained his majority. Division of Mental Diseases, upon a finding
that such a patient, admitted as a county patient, may be placed
upon a pay patient status upon a finding by the division that the
parents of such child are able to pay a certain amount for his support.
In such a situation, parents are liable for the support of their
children although such children have passed their majority. The
Probate Court is no way involved in this matter.

May 11, 1960

Honorable Addison M. Duval, M.D.
Director, Division of Mental Diseases
State Office Building
Jefferson City, Missouri



Dear Dr. Duval:

Your recent request for an official opinion reads:

"The 70th General Assembly enacted Senate Bill No. 93 relating to the Missouri State Schools for the Mentally Deficient. A recent problem has developed in this connection wherein a patient, previous to the enactment of Senate Bill No. 93, had been committed to the Marshall State School and Hospital as a Boone County patient by order of the Boone County Court.

"On recent administrative review of all patients in the Marshall State School and Hospital after enactment of Senate Bill No. 93, it was found that this patient's family, in the opinion of the Superintendent of the State School and Hospital, was able financially to pay a rate of \$45.00 monthly for the care of this patient as a private pay patient and this was reported to the County Court. The attorney for the patient's family has advised the County Court that Senate Bill No. 93 does not apply to a patient admitted to the State School and Hospital prior to August 29, 1959, the date on which this legislation became law. This Division has taken an opposite position on this question still pending before the County Court and, therefore, it becomes necessary that we ask you for an official opinion on the matter.

A second related question is asked of you; namely, does only the Probate Court of the county of residence of a patient in a Missouri State School and Hospital

Honorable Addison M. Duval, M.D.

have the authority to transfer a patient from county patient status to private pay status, or the reverse?

"If the answer is in the affirmative, what relief is provided to the Division of Mental Diseases or the Institution when a patient in the institution is found to be financially able to be a private patient as provided in paragraph 2, section 202.613 of Senate Bill No. 93?

"Presented in a slightly different fashion, if the Division or institution finds ability to pay, must this then be corroborated by the Probate Court before the matter can be settled under paragraph 2, section 202.613?"

In regard to the above we note that, subsequent to making the above opinion request, you have orally advised this department that the patient in the instant case has now passed his majority. We have been similarly advised by the attorney for the family of this patient who, in a letter to this department dated February 22, 1960, takes the position that in view of the fact that the patient is past his majority the parents are under no legal obligation to support him. In view of this situation, we believe that this matter should be disposed of first, to-wit: the liability of parents for the support of an incompetent child who has passed his majority, or who is past 21 years of age.

In this regard we direct attention to the case of State v. Carroll, 309 S.W2d 654. In that case one Roberta Kramer, an adult incapacitated woman sought a declaratory judgment against her divorced parents, establishing their duties of support and maintenance. The court in its opinion stated the question thus (1.c. 658[8]):

"* * * Does a legal duty rest upon a father to support his adult unemancipated, unmarried and needy child who as a result of epilepsy is totally and permanently disabled from gainful employment, who from infancy has been either in hospitals or in the home of her parents and who has remained in the custody of her mother since the divorce of the parents? * * *"

The court, after a very thorough discussion of this matter, concludes that such a duty does rest upon the parents. We note the following language (1.c. 661):

Honorable Addison M. Duval, M. D.

"It is impossible on principle to distinguish between the duty to support a twenty year old child incapacitated by infancy and the duty to support an adult unmarried, unemancipated and insolvent child incapacitated from self-support by mental or physical infirmity. The duty in both cases arises out of the helplessness of the child, and the drawing of a line in all cases at the age of twenty-one years is artificial and arbitrary."

In the light of such information as we have, we believe that the person now in the state school at Marshall comes within the law as set forth above. Such person is incapacitated from supporting himself; so far as we know has never been able to do this but has always been supported by his parents until such support was taken over by the state upon the admission of the child to the state school. We believe, therefore, that it may be said that the obligation of the parents to support this child did not cease when the child attained his majority, has not ceased at this time but is yet a duty which rests upon the parents.

We come now to the second question which is involved, whether Senate Bill No. 93, enacted by the 70th General Assembly, which bill became effective August 29, 1959, applies to persons admitted to Missouri state schools prior to the effective date of such bill.

The argument is advanced that the language of the bill, particularly paragraphs 202.613 and 202.614, Sections 202.611 and 202.615, VAMS, plainly indicate that the bill is to apply only to persons admitted after the effective date of the bill. On the contrary, the Division of Mental Diseases takes the position that this bill is applicable to persons admitted prior to its effective date. It is upon such basis that the Division seeks to have this patient transferred from the status of a county patient to that of a private patient supported by his parents, this latter being based upon a finding by the superintendent of the state school that the patient's family is financially able to pay the sum of \$45 per month for the support of this patient.

It is true that the language of Senate Bill No. 93, Sections 202.613 and 202.614, is addressed to persons admitted when the bill is effective. We do not believe, however, that this is in any way decisive in view of the fact that the bill does not in any way attempt to become retroactive.

We do believe, on the contrary, that the provisions of the bill apply to persons admitted prior to its effective date.

Honorable Addison M. Duval, M. D.

On June 18, 1958, this department rendered an opinion to Mrs. Ruth Nanson, Executive Secretary, Division of Mental Diseases, Jefferson City, Missouri, a copy of which is enclosed. We direct attention to the first portion of that opinion (pages 1-4 in which this very question is discussed). The specific issue there was whether a law, enacted by the 69th General Assembly which became effective August 29, 1957, vesting in the Director of the Division of Mental Diseases the authority to increase the amount of pay for the support of pay patients in state hospitals, applied to pay patients admitted to the hospital prior to the effective date of the law. We held that it did so apply on the ground that patients did not acquire a vested right by the act of being admitted, and that their admission did not give rise to any contract, express or implied, between the patient and the hospital as to the amount which the patient was to pay for his maintenance. We believe that the same reasoning is applicable in the instant situation, and that Senate Bill No. 93 does apply to the Boone County patient and that the Division of Mental Diseases may, upon a finding that the parents of this patient are able to pay a particular amount for his support, transfer him from the status of county patient to that of private patient.

You also inquire whether only the probate court of the county of residence of a patient in a Missouri state school has the authority to transfer a patient from county patient status to private pay status. We do not believe that the probate court is in any way involved in this matter. In support of that statement we direct attention to numbered paragraph 2 of Section 202.613 of Senate Bill No. 93, (§202.611 VAMS) which reads:

"The ability of the parents, guardian or others to provide for the support of a private patient shall be determined by the division or institution and the private patient admitted on the payment of such charges as are deemed just and equitable but not to exceed the amount provided for in section 202.330."

We further call attention to paragraph number one of Section 202.615 of Senate Bill No. 93 (§202.621, VAMS), which provides as follows:

"If any person is admitted to a state school or hospital who is unable to pay for his care or treatment, the superintendent shall notify the county court of the county of the patient's residence and the county shall pay semi-annually in cash, in advance, for the support of the patient a sum fixed by the division not to exceed ten dollars per month and in addition the actual cost of clothing and the expenses of

Honorable Addison M. Duval, M.D.

transporting the patient to and from the institution."

From the above it would appear to be clear that the determination as to whether a patient is to be a state patient or a private patient and any change in status of the patient in such regard is to be made by the Division of Mental Diseases or the institution to which the patient is or has been admitted.

CONCLUSION

It is the opinion of this department that Senate Bill No. 93, enacted by the 70th General Assembly, is applicable to a patient in a state school who was admitted prior to the effective date of such Senate Bill and who has now attained his majority.

It is the further opinion of this department that the Division of Mental Diseases or the institution to which the patient was admitted as a county patient, may place such patient upon a private patient status upon a finding by the division or institution that the parents of such child are able to pay a certain amount for his support.

It is the further opinion of this department that in such a situation, parents are liable for the support of their children although such children have passed their majority. It is the further opinion of this department that the Probate Court has no authority to determine whether the patient shall be a state patient or a private patient.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

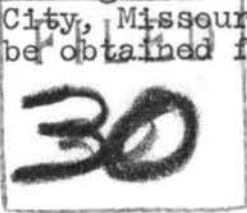
John M. Dalton
Attorney General

HPW:ar:aw

BOARD OF POLICE COMMISSIONER
KANSAS CITY, MISSOURI:
MICROFILMING OF POLICE RECORDS:

It is the opinion of this department that the order, pursuant to Section 109.140, RSMo 1949, authorizing the disposal, archival storage or destruction of records of the police department of Kansas City, Missouri, which have been photographed or microfilmed should be obtained from the Governor of Missouri.

September 1, 1960


Honorable Henry H. Fox, Jr.
Secretary-Attorney
Board of Police Commissioners
Kansas City 6, Missouri

Dear Mr. Fox:

Your recent request for an official opinion reads:

"I am in receipt of your opinion relative to the microfilming of records pursuant to Sections 109.120, 109.130 and 109.140, of the Revised Statutes of Missouri, as these sections pertain to the Police Department of Kansas City, Missouri.

"The opinion does not specifically cover the particular question which we have in mind, and that is whether under Section 109.140, the order to dispose of and destroy records which have been microfilmed or photographed should come from the Governor or the Mayor."

Section 109.140, RSMo 1949, reads:

"Whenever such photostatic copies, photographs, microphotographs or reproductions on films shall be placed in conveniently accessible files and provisions made for preserving, examining and using same, the said head of a state department, commission, bureau or board, county office or department, city office or department may certify those facts to the governor, or to the county court or to the mayor of a municipality, respectively, according to their status as subdivisions of government, who shall have the power to authorize the disposal, archival storage or destruction of the records or papers from which such photographic copies were made."

Section 84.350, RSMo, Cum. Supp. 1957, reads:

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"In all cities of this state that now have, or may hereafter have three hundred thousand inhabitants and not over seven hundred thousand inhabitants, there shall be, and is hereby established, within and for the cities, a board of police commissioners to consist of four commissioners as provided in section 84.360, together with the mayor of said cities, or whosoever may be officially acting in that capacity, and the board shall appoint one of its members as president, and one member as vice-president; and the president, or vice-president in the absence of the president, shall be the presiding officer of the board and shall act for it when the board is not in session. The commissioners shall be citizens of the state of Missouri and shall have been residents of the respective cities in which they are appointed to serve for a period of four years next preceding their appointment. They shall, except as specified in section 84.360, hold their offices for four years, and until their respective successors are appointed, and qualified, and received each a salary of two thousand four hundred dollars per annum, payable not less than semimonthly. As amended Laws 1957, 2nd Ex. Sess. p. 152, §1."

Section 84.360, RSMo 1949, reads:

"The governor of the state of Missouri, by and with the consent of the senate, shall appoint the four commissioners provided for in section 84.350, and one commissioner shall be appointed for a term of one year; one commissioner shall be appointed for a term of two years; one commissioner shall be appointed for a term of three years; one commissioner shall be appointed for a term of four years. Their successor shall each be appointed for a term of four years, and said commissioners shall hold office for their term of appointment and until their successors shall have been appointed and qualified. In case of a vacancy in said board from any cause whatever, it shall be filled by appointment for the unexpired term, in the same manner as in the case of original appointments. The governor shall issue commissions to the persons so appointed, designating the time for which they are appointed in case the appointment is to fill an unexpired term occasioned by death, resignation or any other cause whatever, and whenever the term of office of any commissioner expires, the appointment of his successor shall

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be for four years."

From the above it will be noted that the Kansas City Board of Police Commissioners consists of four commissioners appointed by the Governor of Missouri and the mayor of the City of Kansas City or whosoever may be officially acting in that capacity at any particular time.

The matter of to whom there shall be certified the facts set forth in Section 109.140, supra, whether to the Governor, or the county court or the mayor of a municipality is determined "according to their status as subdivisions of government * * *."

In this regard we would direct attention to the case of State v. Kemp, 283 SW2d 502. In that case the Missouri Supreme Court stated in part, 1.c. 514 [2,3]:

"The statutes creating the board of police commissioners of Kansas City and the police department thereof, defining their respective duties, powers and responsibilities, and providing for their maintenance, §§84.350-84.860, expressly retain jurisdiction of the Kansas City police system as an agency of the state. American Fire Alarm Co. v. Board of Police Commissioners, 285 Mo. 581, 227 SW 114, 116-117 [1-3]. It is, therefore, hardly conceivable the Legislature could have intended that the city, chargeable as a state agency with the maintenance of the state controlled police department in the manner prescribed by §§ 84.730 and 84.780, should at the same time have the power as a municipal corporation to defeat the legislative mandate of the State of Missouri through a policy of 'earmarking', either by charter or ordinance, portions of its revenue that otherwise would constitute 'general revenue' within the meaning of §84.730. This does not mean that the city may not, for its own purposes, lawfully divide its funds or allocate them in any manner it sees fit or subject its general revenue funds to particular public purposes, so long as it does not do so contrary to statute or its charter. 64 C.J.S., Municipal Corporations, §1884, pp. 443-444. But we think it does mean the city may not, solely by authority of its charter or by ordinance, make such funds unavailable to the state under §84.730. In so concluding, we reaffirm a principle long since announced

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and consistently followed in this state."

"* * * It is significant that the original legislative act supplanted the municipal system which had existed prior to that time. Id., [153 Mo 23] 1.c. 32 (54 SW 524). The opinion written by Judge Gantt, referring to earlier cases, says ([153 Mo.] 1.c. 47 [54 SW 530]):

"The power of the Legislature to provide the necessary agencies to perform the high functions of the state in the preservation of * * * peace, etc., and to impose the duty of paying therefor on the locality for which * * * said agencies were created, was fully and firmly established.""

From the above it would clearly appear that the Kansas City Board of Police Commissioners is a state agency and has the status of a subdivision of the state government. For that reason we believe that the certification of the facts referred to in Section 109.140, supra, should be to the Governor of Missouri.

CONCLUSION

It is the opinion of this department that the order, pursuant to Section 109.140, RSMo 1949, authorizing the disposal, archival storage or destruction of records of the police department of Kansas City, Missouri, which have been photographed or microfilmed should be obtained from the Governor of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:ar

KANSAS CITY BOARD OF
POLICE COMMISSIONERS:

The Kansas City Police Department is
not authorized by law to pay to its
civilian employees a mere gratuity.

October 13, 1960



Mr. Henry H. Fox, Jr.
Secretary-Attorney
Board of Police Commissioners
Kansas City 6, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"Some time ago - I believe about 1953 - while I was Judge of the County Court of Jackson County, the question arose as to how long the County could retain an individual who was injured and/or hospitalized as a result of injuries received in 'line of duty' on an active pay status.

"My recollection is that there was an opinion rendered by your office indicating that the matter would be governed in part by the length of time that the employee was unable to perform official duties and, further, whether the individual injured was performing a so-called vital function and was a person not easily replaced.

"The Board of Police Commissioners in regular session on Thursday, the 21st of July, 1960, requested that I obtain an opinion in regard to a situation as follows:

"A female civilian employee, employed in the Youth Bureau of the Kansas City, Missouri, Police Department for a number of years, was stricken with an incurable disease. She had

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accumulated considerable sick leave at the rate of fifteen days per year. Her total accumulated sick time has now been used by her and the question is whether the Department would be legally justified in continuing to pay her regular salary or any portion thereof after she has exhausted her sick leave time.

"Our query is what legal rights does the Police Department have, due to the fact the Department is paid with funds appropriated by the City of Kansas City, to continue to pay the individual referred to either until death or her return to work."

It should first be pointed out that the monies which would be given to these two employees are public funds. 37 C.J.S., Fund or Funds, p. 1404 states:

"Public funds. The term 'public funds' means funds belonging to the state or to any county or political subdivision of the state; more specifically taxes, customs, moneys, etc., raised by the operation of some general law, and appropriated by the government to the discharge of its obligations, or for some public or governmental purpose; and in this sense it applies to the funds of every political division of the state wherein taxes are levied for public purposes. The term does not apply to special funds, which are collected or voluntarily contributed, for the sole benefit of the contributors, and of which the state is merely custodian."

In *State v. Igoe*, 107 S.W. 2d 929, 933, 340 Mo. 1166 (1937) the Supreme Court of Missouri adopted a similar definition:

"The term 'public funds' means funds belonging to the state or any county or political subdivision of the state; more especially taxes, customs, moneys,

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etc., raised by operation of some general law, and appropriated by the government to the discharge of its obligations, or for some public or governmental purpose * * *."

The funds with which the salaries of policemen and civilian employees of the Kansas City Police Department are paid are derived from the revenue of the City of Kansas City. Section 84.730, Laws 1957, 2nd Ex. Sess. p. 152, infra. This would seem to clearly demonstrate that these funds are public funds.

Article III, Section 38(a) of the Missouri Constitution, 1945, states:

"Limitation on use of state funds and credit--exceptions--public calamity--blind pensions--old-age assistance--aid to children--direct relief--adjusted compensation for veterans--rehabilitation--participation in federal aid.--The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, excepting aid in public calamity, and general laws providing for pensions for the blind, for old age assistance, for aid to dependent or crippled children or the blind, for direct relief, for adjusted compensation, bonus or rehabilitation for discharged members of the armed services of the United States who were bona fide residents of this state during this service, and for the rehabilitation of other persons. Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States." (Emphasis ours).

Article VI, Section 25 of the Missouri Constitution, 1945, states:

"Limitation on use of credit and grant of public funds by local governments--exceptions--pensions for policemen, firemen, and other employees of certain cities--benefit funds for educational employees.--

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No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation, except that the general assembly may authorize any municipality to provide for the pensioning of the salaried members of its organized police force or fire department and the widows and minor children of the deceased members, and may authorize any city of more than 40,000 inhabitants to provide for the pensioning of other employees, and the widows and minor children of deceased employees, and may also authorize payments from any public funds into a fund or funds for paying benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services, and to their beneficiaries or estates."

It will be noted that under the above constitutional provisions the legislature is empowered to establish pension plans for certain classes and prohibited from so doing for other classes. Such plans are established for firemen and policemen in Chapter 86, RSMo 1949. Provision is also made for the establishment of a Police Relief Association in Sec. 84.800-.810, RSMo 1949. However, no similar provision has been made for the civilian employees of the Kansas City Police Department.

The authorization for the employment and compensation of such civilian employees is contained in Section 84.520, Laws 1957, 2nd Ex. Sess. p. 158 which states:

"The chief of police, with the approval of the board, shall appoint such number of civilian employees as he deems necessary from time to time for the operation of the police departments, except the limitation on the total number of all police employees, including civilians, set forth in section 84.510 shall apply. Compensation for civilian employees of the police departments shall not exceed the compensation paid to police officers of the departments who perform like or similar work to that of such civilian employees, but the chief of police, with the approval of the board, may establish lower compensation for civilian employees than that received by police officers."

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There is no authorization for a gratuity to be paid to such civilian employees. The above constitutional provisions expressly prohibit the giving of public funds to an individual. The statute authorizing their employment expressly states that the compensation of such employees shall not exceed that of police officers doing similar work. Compensation here meaning payment for services rendered. This is evidenced by the wording of Section 84.730, Laws 1957, 2nd Ex. Sess. p. 159, which states:

"It shall be the duty of the board, on the fifteenth day of January of each year, to prepare, in writing, a budget estimating the sum of money which will be necessary for the next fiscal year, to enable the board to discharge the duties hereby imposed upon it, and to meet the expenses of the police department, which it shall forthwith certify to the governing body of such cities, and the budget shall itemize purposes of expenditure by organization units, activities, functions, and character classes in not less detail than 'personal services', 'contractual services', 'commodities', and 'capital outlays', and shall in any event, be prepared in form and detail similar to the form and detail in which budgets for the various departments of such city government are prepared. The governing body of the cities is hereby required to appropriate the total amount so certified, payable out of the revenue of the cities after first having deducted the amount necessary to pay the interest on the indebtedness of the cities, the amount necessary for lighting the city, and any sum required by law to be placed to the credit of the sinking fund of the cities, and if the board shall be required to call out extra police force and the expense thereof shall not have been contemplated in their estimate for the fiscal year during which the extra police force is called out, it shall immediately certify the expense of such additional force, and the additional amount so required shall be appropriated for that purpose, except that in no event

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shall the governing body of the cities be required to appropriate for the use of the police board in any fiscal year an amount in excess of one-fifth of the general revenue fund of such year." (Emphasis ours).

No payments could be made to either of these employees as "extra compensation" for past services due to the prohibition upon such payments contained in Article III, Section 39(3), Missouri Constitution, 1945, which states:

"The general assembly shall not have power:

"(3) Extra compensation to public employees or contractors.--To grant or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part;"

The Board is allowed under Section 84.520, supra, to set the compensation of such employees, and a short absence might be such that the Board would be justified in continuing the employee's salary. While the Board would not be authorized to pay these employees a mere gratuity, in some instances it might be advantageous to continue the salary of skilled employees while they are temporarily absent due to illness because of the expense to the state in properly training a new employee. If it were known that the employee could never return to work then there would be no justification to continue such payment, however, if the employee could be expected to return to work within a reasonable time it would be within the discretion of the Board to continue such payment as they may deem in the best interests of the state. However, the Board should be exceedingly cautious not to authorize a mere gratuity to such an employee under the guise of paying him a salary. Whether the money paid to the temporarily absent employee would be considered compensation or a gratuity would depend upon the specific facts of each case, taking into consideration the length of time during which the employee is unable to perform the services for which he was hired, whether such employment is a continuing one or is for only a special purpose, and the feasibility of hiring a new employee

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to perform the services which the disabled employee had previously performed. It should be pointed out that, as stated in your opinion request, these employees have already used up all of the sick leave which was allotted to them.

Enclosed you will find an opinion to Roderic R. Ashby, Prosecuting Attorney of Mississippi County, dated April 25, 1953, dealing with a similar situation. It may be of use to you in better understanding those elements that must be taken into consideration in determining whether an employee is being compensated for his services or is being given a mere gratuity.

CONCLUSION

It is, therefore, the opinion of this office that the Kansas City Police Department is not authorized by law to pay to its civilian employees a mere gratuity.

The foregoing opinion, which I hereby approve, was prepared by my assistant, James W. Riner.

Yours very truly,

John M. Dalton
Attorney General

JWR:vlw

Enc. - Roderic R. Ashby
4-25-53

ST. LOUIS COUNTY:
CHARTER COUNTIES:
COUNTY CHARTERS:
ASSESSORS:
COLLECTORS:
COUNTY CLERKS:

St. Louis County may, by amendment of its charter, abolish the elective offices of assessor and collector and establish a department of revenue under an elected director of revenue, which department shall perform all of the duties heretofore imposed upon the assessor and collector and the duties of the county clerk in connection with taxation.

June 15, 1960

Mr. William E. Gallagher
St. Louis County Counselor
Courthouse
Clayton 5, Missouri



Dear Sir:

You have recently requested an opinion from this office wherein you asked the following questions concerning the proposed amendment to the St. Louis County Charter to create a department of revenue:

"(1) Whether the Electorate of a chartered county may provide, by Charter amendment, for the extinguishment of the elective offices of Assessor and Collector and for the establishment of a new Department of Revenue, headed by an elected Director, which Department would possess and exercise all powers and duties of the said elective offices of Assessor and Collector?

"(2) Whether the Electorate of a chartered county may provide, by Charter amendment, for the transfer of all statutory tax duties from the County Clerk to a new Department of Revenue created by the same Charter amendment?

"(3) Whether the Electorate of a chartered county may provide, by Charter amendment, for the performance by a Department of Revenue of all of those duties provided by State statute to be performed by the offices of the Assessor and the Collector, and those statutory

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duties of the County Clerk which relate to the collection of State taxes, and for which duties the County is paid by the State by means of monetary reimbursement and fees provided for by State statute?

"(4) Whether the Electorate of a chartered county may provide, by Charter amendment, for the creation of appointive offices of Assessor and Collector, which offices would perform, under the supervision and control of an elected Director of a Department of Revenue, those duties enjoined and placed by State statute on and in the elective offices of Assessor and Collector?"

St. Louis County has heretofore adopted a special charter under the provisions of Sections 18(a) to 18(1) of Article VI of the Missouri Constitution of 1945.

Section 18(b) of said Article VI provides as follows:

"Provisions required in county charters.- The charter shall provide for its amendment, for the form of the county government, the number, kinds, manner of selection, terms of office and salaries of the county officers, and for the exercise of all powers and duties of counties and county officers prescribed by the Constitution and laws of the state."

Section 18(e) of Article VI provides as follows:

"Laws affecting charter counties - limitations. - Laws shall be enacted providing for free and open elections in such counties, and laws may be enacted providing the number and salaries of the judicial officers therein as provided by this Constitution and by law, but no law shall provide for

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any other office or employee of the county or fix the salary of any of its officers or employees."

Thus, the county, under its charter, is required to provide "for the exercise of all powers and duties of counties and county officers prescribed by the Constitution and the laws of the state." Section 18(b). However, the county, by its charter, may provide for the "number, kind, manner of selection, terms of office and salaries of the county officers." Section 18(b). Section 18(e) of the Constitution authorizes laws providing for free and open elections and the number and salaries of judicial officers only and "no law shall provide for any other office or employee of the county or fix the salary of any of its officers or employees."

Thus, it would appear that the county must provide for the performance of the duties heretofore imposed by law on assessors and collectors and for the duties in connection with taxation so imposed upon the clerk of the county court. However, the county is not bound to provide for the same officers to perform these duties, but may set up its own machinery for the fulfilling of these functions. This was the holding of the Missouri Supreme Court, en banc, in the case of State ex inf. Dalton, ex rel. Shepley v. Gamble, 280 S.W. 2d 656. The court said, 1. c. 659:

"St. Louis County, regardless of its charter, remains a legal subdivision of the state. Art. VI, §§ 1 and 18(a). As such, it is charged with the performance of the state functions just as other counties are. Section 18(b), supra, expressly requires that the charter must provide 'for the exercise of all powers and duties of counties and county officers prescribed by the constitution and laws of the state.' "

The court went on to say, 1. c. 660:

"It must perform state functions over the entire county and may perform

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functions of a local or municipal nature at least in the unincorporated parts of the county. These are constitutional grants which are not subject to, but take precedence over, the legislative power. St. Louis County alone has the right to determine 'the number, kinds, manner of selection, terms of office and salaries' of its county officers. There can be no doubt that this is a proper constitutional provision, since the people of the state are sovereign, Art. 1, § 1, and they 'have the inherent, sole and exclusive right to regulate the internal government and police thereof * * *,' Art. 1, § 3. The constitution is harmonious in recognizing an exception to the provision for general laws for the organization and classification of counties. Art. VI, § 8."

And the court concluded:

"We hold that the sheriff is a county officer within the meaning of the constitutional provisions for county charters, and particularly §§ 18(b) and 18(e), Art. VI. This clearly appears from the language of the pertinent sections. The result is that provision must be made by the charter county for the performance of the duties enjoined upon sheriffs by our statutes, but the county has the choice as to what officer or agency will be designated to perform the duties. Or the duties may be divided for the purpose of performance as provided by the amendment to the St. Louis County Charter."

It would appear that this reasoning applies with equal force to the offices of assessor and collector and, likewise, to the duties of the county clerk in connection with taxation and, therefore, it would follow that the county

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may abolish the elective offices of assessor and collector and provide a department of revenue to perform the functions of assessing and collecting. Likewise, this authority indicates that the county may take from the county clerk the duties heretofore performed by such official in connection with taxation and provide that such duties are to be performed by said department of revenue.

In the more recent case of *Hellman v. St. Louis County*, 302 S.W. 2d 911, the Supreme Court considered the powers and duties of St. Louis County under its charter and said, 1. c. 916:

"We know of no constitutional or statutory provision that a charter county must exercise the powers and duties enjoined upon it by the constitution in precisely the same manner as prescribed by the general law of the state. The case of *State on Inf. of Dalton ex rel. Shepley v. Gamble, Mo.*, 280 S.W. 2d 656, 660[6,7], states that: '* * * provision must be made by the charter county for the performance of the duties enjoined upon sheriffs by our statutes, but the county has the choice as to what officer or agency will be designated to perform the duties.' Little purpose would be served in authorizing the adoption of charters of local self-government in the more populous counties if such counties could not adopt reasonable means and methods of carrying out their governmental functions in such a manner as to meet the peculiar needs of such counties. It is common knowledge that the problems of the uniform assessment of the taxable property of St. Louis County are manifold and unique.

"[5,6] Article VI, § 18(b) of the Constitution, in authorizing the adoption of home rule charters, directs that the charter 'shall provide * * * for the exercise of all powers and duties of

Mr. William E. Gallagher

counties and county officers prescribed by the constitution and laws of the State.' Such a declaration carries with it an implied grant of such powers as are reasonably necessary to the exercise of the powers granted and are not contrary to the public policy of the state. State ex rel. Spink v. Kemp, Mo., 283 S.W. 2d 502, 514[4-6]."

See, also, the cases of Stemmler v. Einstein, 297 S.W. 2d 467, and Schmoll v. Housing Authority of St. Louis County, 321 S.W. 2d 494.

CONCLUSION

It is, therefore, on the basis of the foregoing, the conclusion of this office that St. Louis County may amend its charter to abolish the elective offices of assessor and collector and establish a department of revenue headed by an elective director of revenue, which department would exercise the powers and duties heretofore imposed upon such elective assessor and collector; likewise, St. Louis County may, by amendment of its charter, transfer from the county clerk the duties heretofore imposed upon that officer in connection with taxation and provide for the exercise of such duties by the department of revenue. St. Louis County may also provide for appointive offices of assessor and collector within its department of revenue.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Fred L. Howard.

Very truly yours,

John M. Dalton
Attorney General

FLH:lc

EMPLOYMENT SECURITY LAW:
CERTIFICATES OF ASSESSMENTS:
FILING AND RECORDING FEES
NOT PAYABLE IN ADVANCE:
CIRCUIT CLERK NOT LIABLE
FOR UNPAID FEES: WHEN:

Missouri Division of Employment Security's
certificates of assessment showing amount
of employers' delinquent contributions,
interest and penalties under Section
288.170, RSMo Cum. Supp. 1957, shall be
filed and recorded by circuit clerk with-
out payment of his fees in advance. When

filing and recording fees for certificates are unpaid at time circuit
clerk's accounts are audited by state auditor, clerk cannot legally
be found liable to county for uncollected fees, if he has charged for
and reported same to county court as provided by Sections 483.550 and
483.555, RSMo 1949.

January 12, 1960

Hon. J. Allen Gibson
Prosecuting Attorney
Stone County
Galena, Missouri



Dear Mr. Gibson:

This department is in receipt of your request for a legal
opinion reading as follows:

"Is the County Recorder required to record the
Certificates of Assessments under Section 288.170
R.S. Mo. Supplement without his recording fee being
paid in advance by Missouri Division of Employment
Securities? If you so decide that he is required
to record, is he then to be held accountable to the
State Auditor if the fees are unpaid?"

Two questions are posed in the opinion request. The first
one inquires if the county recorder is required to record certifi-
cates of assessments under Section 288.170, RSMo, Cum. Supp. 1957,
without his recording fees being paid in advance by the Missouri
Division of Employment Security. The second inquiry is that if
the recorder is required to record such certificates is he held
accountable to the state auditor if the fees are unpaid.

Both of these inquiries are in regard to the duties of the
county recorder of deeds, but it is assumed you have reference to
the duties of the circuit clerk and not to those of the recorder
because Section 288.170, RSMo Cum. Supp. 1957, imposes the duty of
recording said certificates upon the circuit clerk and not upon
the recorder of deeds.

All statutory references herein are to RSMo 1949 unless other-
wise stated.

Section 288.170, RSMo, Cum. Supp. 1957, provides for the col-
lection of delinquent contributions, interest and penalties from
the employers liable for same under provisions of the employment

Hon. J. Allen Gibson

security statute and reads as follows:

"1. In any case in which any contributions, interest or penalties imposed under this law are not paid when due and the assessment of which has become final, the division may file for record in the office of the clerk of the circuit court in the county in which the employer owing said contribution, interest or penalties resides, or has his place of business, or any other county in which he has property, or all of them, a certificate specifying the amount of the contributions, interest and penalties due and the name of the employer liable for the same and it shall be the duty of the clerk of the circuit court to file such certificate of record and enter the same in the record of the circuit court for judgments and decrees under the procedure prescribed for filing transcripts of judgments. From the time of the filing of such certificate, the amount of the contributions, interest and penalties specified therein shall have the force and effect of a judgment of the circuit court until the same is satisfied by the division through its duly authorized agents. Execution shall be issuable at the request of the division, its agent or attorney as is provided in the case of other judgments. No exemption shall be allowed from the levy of an execution issued for such contributions, interest and penalties and no indemnifying bond shall be required by the sheriff before making levy.

"2. If any employer defaults in the payment of contributions, interest, or penalties the amount due shall be collected by civil action in the name of the division. Such suit shall be brought in the county wherein the employer resides or has a place of business or agent for the transaction of business in this state or where he or it may be found, and the employer adjudged in default shall pay the cost of such action. Any civil action brought under this law shall be heard by the court at the earliest possible date and shall be entitled to preference on the calendar of the court over all other civil actions except petitions for judicial

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review under this law and cases arising under the workmen's compensation law of this state. If any employer shall fail to resort to the remedy herein provided for reassessment of any contributions, interest or penalties within the time as provided herein, such employer shall thereafter be precluded from asserting any defense in a direct suit for the collection of the contributions.

"3. The foregoing remedies shall be cumulative and no action taken shall be construed as an election on the part of the state or any of its officers to pursue any remedy or action hereunder to the exclusion of any other remedy or action for which provision is made."

It is noted that the above-quoted section provides that when contributions, interest and penalties become due and unpaid by an employer, and the assessment of same has become final, the Division of Employment Security may file a certificate showing the amount of the contributions, interest and penalties and the name of the employer liable for same in the office of the clerk of the circuit court of the county of the employer's residence or the county in which his business or agent is located, or any other county in which the employer has property, or in all of such counties. When the certificate is presented to the circuit clerk, it is his duty to file and record it in the circuit court judgment and decree record, and in so doing, he shall observe the statutory procedure for filing transcripts of judgments. Section 511.490, RSMo 1949, dealing with the filing of transcript of judgment, provides:

"Any clerk of a court who shall refuse or neglect, after tender of his fees for the same, to file and record such transcript and docket such judgment or decree, as in sections 511.440 to 511.480 directed, shall be liable on his official bond to any person damaged by reason of such refusal or neglect, in double the amount of damages sustained."

Section 288.170, supra, further provides that from the time of the filing of the certificate, the amount stated therein shall have the force and effect of a circuit court judgment until it has been satisfied. An execution may be issued at the request of the Division of Employment Security for the amount of delinquent contributions, interest and penalties, and no property of the defendant shall be exempt from levy on such execution.

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Paragraph 2, Section 288.170, affords the Division of Employment Security the remedy of bringing a civil action in the court of the county in which the employer resides, or his place of business, agent for the transaction of business, or in any county in which the employer may be found in this state, to recover delinquent contributions, interest and penalties.

The Division is not required to pay court costs of such action. It was so held in the case of *Murphy v. Limpp*, 147 SW2d 420, where the plaintiffs were members of the Missouri Unemployment Compensation Commission, the predecessor agency of the present Division of Employment Security. The Commission brought suit in the Circuit Court of Gentry County to recover delinquent unemployment compensation from an employer. The employer's motion requiring the Commission to furnish security for costs was sustained. Thereafter, upon a trial of the case, a judgment was had for the defendant and defendant was awarded court costs. From this judgment, the Commission appealed to the Supreme Court of Missouri. The appellate Court affirmed the judgment of the trial Court in all respects, except that part of the judgment awarding costs to the defendant which was reversed.

In discussing that part of the judgment as to court costs, the Court said at l.c. 423 as follows:

"[3-5] The trial court entered a judgment for the costs incurred against appellants. This action was assigned as error, and appellants contend that the state is not liable for the costs in a case of this character. In 59 C.J., p. 332, Sec. 503, we read: 'It is a general and well established rule apart from statute that costs are not recoverable from a state, in her own courts, whether she has brought suit as plaintiff or has properly been sued as defendant; or whether she is successful or defeated.' Therefore, absent a statutory provision, the costs were erroneously assessed against the state. * * *"

From this decision, it is apparent the state or its agencies is not liable for costs in this class of actions. Applying the doctrine of this case further, it appears that if the Division of Employment Security were to file an action of this kind in the circuit court of your county, the circuit clerk could not require the Division to make a cost deposit or furnish security for court costs.

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Since the Division of Employment Security is not liable for court costs in actions brought to recover contributions from a delinquent employer, nor for costs deposits, and cannot be made to furnish security for court costs, by analogy it seems that the Division also cannot be required to pay the fee for filing certificates of assessment, to the circuit clerk, absent express provision requiring such payment by the State and its agencies, or by the Division of Employment Security. No Missouri statutes expressly provide that the circuit clerk shall charge the State or its agencies, or the Missouri Division of Employment Security a fee in advance for filing and recording the certificates authorized by said Section 288.170.

Therefore, our answer to the first inquiry is that it is the duty of the clerk of the circuit court to file and record certificates of assessments of delinquent contributions, interest and penalties, as provided by Section 288.170, supra, and that he cannot require the fees due him for such services to be paid in advance by the Division of Employment Security.

The second inquiry is that if the circuit clerk is required to record certificates of assessment (under the circumstances referred to in the first inquiry) is he accountable to the state auditor if the fees are unpaid.

It is our assumption that the inquiry apparently intended is: If the answer to the first inquiry is in the affirmative and the state auditor should subsequently audit and accounts of the circuit clerk, could the auditor legally find the circuit clerk short in his accounts, and liable to the county for filing and recording fees for such certificates, if the fees are unpaid. We have concluded that it is the duty of the circuit clerk to file and record the certificates of assessment and that he cannot require the Division of Employment Security to pay the fees in advance.

If the clerk has substantially complied with Sections 483.550 and 483.555 in charging the statutory fee for filing and recording the certificates of assessment, and the clerk has reported all such earned and uncollected fees to the county court in the manner provided by Section 483.560, it is our thought that after an examination of the clerk's accounts by the state auditor, the auditor could not legally find the clerk short in his accounts and liable to the county for failure to collect filing and recording fees from the Division of Employment Security prior to filing and recording such assessments.

CONCLUSION

Therefore, it is the opinion of this office that when the Missouri Division of Employment Security presents certificates of

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assessment showing the correct amount of delinquent contributions, interest and penalties owed by employers, to the clerk of the circuit court for filing and recording, in accordance with the provisions of Section 288.170, RSMo, Cum. Supp. 1957, the circuit clerk shall file and record all such certificates, without the filing and recording fees being paid in advance.

It is the further opinion of this office that when said certificates of assessments have been filed and recorded by the circuit clerk in the manner provided by Section 288.170, RSMo, Cum. Supp. 1957, and the filing and recording fees are unpaid at the time the accounts of the circuit clerk are audited by the state auditor, the clerk cannot legally be found short in his accounts and liable to the county for the unpaid fees, if it appears that he has charged all such fees on behalf of the county and has reported same to the county court as provided by Sections 483.550 and 483.555, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General

PNC:om/ar

SALARY:
FIRST DEPUTY:
CIRCUIT CLERK AND RECORDER:
FOURTH CLASS COUNTY:

An employee who has been classified as a first deputy to the circuit clerk and recorder under Section 483.380, RSMo, C. S. 1957, in a fourth class county whose population brings it within the purview of subsection 2, Section 483.382, cannot by agreement or otherwise be paid less than the amount set forth in subsection 2, supra.

May 23, 1960

Honorable J. Allen Gibson
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Mr. Gibson:

Your opinion request of May 2, 1960, reads:

"In accordance with Section 483.380 the Circuit Court has appointed a first deputy to the Circuit Clerk and Recorder. It has been agreed between the judge, clerk and deputy that she is to work on a part time basis at a specified sum per hour, which amount is not to exceed the amount stated in Section 483.382, sub-section two.

"Is this arrangement permissible under above Sections or could the county be held liable to pay the full salary for such deputy as specified in the Statutes?

"This deputy is now working under above arrangement and the earliest possible reply will be greatly appreciated."

Section 483.380, RSMo, C. S. 1957, to which you refer reads:

"1. The circuit clerk and recorder in counties of the fourth class may appoint and classify at least one and not more than three deputies and assistants except that the number of such deputies and assistants, in excess of one, shall be determined by the judge of the circuit court, as the judge shall deem necessary for the prompt and proper discharge of the duties of his office. The judge of the circuit court, in his order designating the number of deputies and assistants to be appointed by the circuit clerk and recorder, shall designate the period of time such deputies or assistants may be employed. Every such order shall be entered on record and a certified copy thereof shall be filed in the office of the county clerk. The circuit

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clerk and recorder may, at any time, discharge any deputy or assistant and may regulate the time of his employment and the circuit court, for good cause, may at any time modify or rescind its order permitting an appointment to be made.

"2. The classification of deputies and assistants provided for in this section is as follows: Chief deputy, first deputy and second deputy; except that there shall not be more than one deputy or assistant in any one classification at any one time."

Section 483.382, numbered paragraph 2 reads:

"In counties having a population of seven thousand five hundred and less than ten thousand, the chief deputy shall receive the sum of one thousand nine hundred twenty dollars; the first deputy shall receive the sum of one thousand seven hundred forty dollars; the second deputy shall receive the sum of one thousand five hundred sixty dollars." (Underscoring ours.)

We note from the 1950 census that Stone County falls within the population bracket set forth in subsection 2 quoted above.

It will be noted that Section 483.380, supra, empowers the circuit clerk and recorder to appoint and classify at least one and not more than three deputies, but that the number of such deputies in excess of one shall be determined by the judge of the circuit court, and that the judge of the circuit court shall designate the period of time of employment of deputies and assistants. Also that the circuit clerk and recorder may at any time discharge any deputy or assistant. It will be noted that nowhere in this section is there any grant of power to the circuit judge or the circuit clerk and recorder with regard to the compensation of deputies and assistants. We believe this to be of some significance, especially in view of the history of Section 483.380, supra. This section, when adopted in 1945, provided that the judge of the circuit court, in his order permitting the circuit clerk and recorder to appoint deputies or assistants, "shall fix the compensation of such deputies or assistants." This section was amended in 1957, and as amended, omits that portion of the old section which gives the circuit judge power to fix the compensation of deputies or assistants. We cannot conclude that this omission was unintentional or without meaning or purpose.

The issue in this case would appear to be whether a county officer, specifically a circuit clerk and recorder in a fourth class county having a population of 7,500 and less than 10,000,

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may pay an employee classified by him as a "first deputy," less than the sum of \$1,740, the amount of pay for such first deputy set forth in the statute quoted above.

In regard to this matter we first direct attention to the case of Powell v. Buchanan County, 155 SW2d 172. In that case an action was filed to recover from Buchanan County a balance claimed to be due plaintiff as salary as chief deputy to the county highway engineer. The defense made to this claim was that the county court had not authorized the appointment of the plaintiff and that no record of such appointment had ever been entered on record. Plaintiff prevailed in the lower court and defendant appealed.

The court found the facts to be that the plaintiff had been regularly appointed; that the amount paid to him was less than the amount fixed by statute, and that plaintiff was entitled to be paid the amount fixed by statute. The judgment was affirmed. The court set forth the statute upon which the claim of the plaintiff was based, which was Section 13488, RSMo 1939, which section reads:

"The recorder of deeds, collector or revenue, clerk of the circuit and criminal courts, clerk of the county court, county highway engineer and county assessor in any such county shall each be entitled to one chief deputy, which chief deputy shall be appointed by said official and be paid a salary of nineteen hundred and twenty dollars per year, to be paid in the same manner as the officers."

At 1.c. 175 [1, 2] the court held:

"* * *In the Whalen case, this court construed these statutes together to avoid repugnancy, holding that sections 'referring to deputies and assistants' should be construed as meaning those other than 'Chief Deputy'; and that the officers designated in Section 13488, were each authorized 'to appoint a "chief deputy" at salary of \$1,920 per year, leaving * * * nothing for the county court to do but pay the salary fixed by statute.'"

It is true that the main issue in this case was whether or not the plaintiff had been regularly appointed, but we do believe that the holding of the court set forth by us above is persuasive in the instant situation.

Honorable J. Allen Gibson

We next direct attention to the case of Coleman v. Jackson County, 160 SW2d 691. The facts in that case are set forth in the opinion of the court as follows (l.c. 693):

"The respondent brought the present action against the appellant Jackson County, Missouri, upon claims which had been assigned to him by 30 different individuals, hereinafter referred to as the assignors. Each of the assignors had acted in the capacity of a deputy or assistant to the Clerk of the Circuit Court of Jackson County at some time during the period from March 1, 1935, to December 31, 1939. The assigned claims are for salaries alleged to be due to the assignors for such services in excess of the amounts actually paid them by the county. The petition originally included claims for amounts falling due from 1931 to 1935, but the jury below found against the plaintiff on such items and the claims for our consideration may therefore be limited to the period from 1935 to 1939. On 13 of the 30 counts in the petition the court directed a verdict for the plaintiff (on one of the 13 the directed verdict was as to a portion of the claim only). The remaining 17 counts were submitted to the jury under instructions which required them to return a verdict for the plaintiff if they should find from the evidence that the assignors named therein were duly appointed and acting deputy clerks within the period under consideration. Upon these counts the verdict was for the plaintiff. Other facts necessary to a decision will be stated in the course of the opinion."

The court stated the law to be (l.c. 693 [3]):

"It is the contention of the respondent that the undisputed documentary evidence in this case entitled him to a directed verdict on the counts mentioned. The claims of the various assignors are based upon the alleged fact that they were duly appointed deputy clerks and that they were paid a salary less than that provided for in Section 13466, RSMo 1939, Mo.St. Ann. §11834, p. 7040, which section, they contend, governs the amount of their compensation. Each of the assignors involved in the counts we are now considering was shown to have been duly appointed as a deputy by the elected circuit clerk. The written appointments of these assignors were introduced in evidence taken from the files of the court. Plaintiff also introduced the records of the Circuit Court of Jackson County, en banc,

showing that that court duly approved the above mentioned appointments. Plaintiff then introduced in evidence the county pay rolls, which are records approved by the county court and kept in the proper county offices, showing the names of these various assignors on such approved pay rolls and showing the actual amounts paid to them, which in each instance was less than the statutory rate. If this documentary evidence as a matter of law showed the due appointment of the assignors and if as a matter of law the assignors were entitled to pay in accordance with the statute schedule, then the plaintiff was properly granted peremptory instructions on the counts in question."

The court found that the statute setting salaries which was invoked did not apply, and for other reasons set aside the judgment. In this case, as in the preceeding one, the issue with which we are here directly concerned was only indirectly involved. But this case, as we believe to be true of the preceeding case, is persuasive of a decision of the issue in the instant case, inasmuch as the court held that the salary fixed by statute was determinative.

We would next call attention to the case of Reed v. Jackson County, 142 SW2d 862. In this case one Reed was appointed a deputy assessor of Jackson County. The pay received by Reed and other of his fellow deputies of whom he was assignee was fixed by statute (Section 11.834, RSMo 1949) at \$2,100 per year. Through a contrivance of shuffling employee classifications, Reed actually was paid less than the aforesaid statute fixed the pay of a person occupying the position which Reed did occupy. A jury was waived, the court found for the defendant, the case was appealed and reversed with directions to enter judgment for plaintiff. In that case the Missouri Supreme Court stated (l.c. 864):

"The authorities on the questions involved in the present cause were reviewed at length in Rothrum v. Barby et al., Mo.Sup., 137 SW2d 532, not yet reported [in State Reports], and there is no occasion to go over the field again. That case was in mandamus to compel the necessary action to pay Rothrum an alleged balance due on his salary as a motor driver of the fire fighting division of the fire department of Kansas City. The trial court found against him and he appealed. The plan followed in the Rothrum case was to deduct from the monthly salary, as fixed by ordinance, for leaves of absence that Rothrum did not take.

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Each month, that the deduction was made, Rothrum signed a printed application for a leave of absence without pay, and the deduction corresponded in amount with the purported absent period. The reason for the deductions was the same as in the present case. In that case the question for decision is stated thus: 'The real question is validity of an agreement, for deductions from pay fixed by ordinance (without any change by ordinance), made between executive officers (the City Manager and department directors) and the other appointed city officers or employees; considering such an agreement either to be implied from the terms of the leave of absence agreements or from acceptance of pay as shown in the payrolls or as an oral contract. Appellant [Rothrum] contends that such an agreement was void; that to withhold and refuse to pay part of his salary fixed by ordinance was unlawful and arbitrary; and that he was thereby deprived of his property without due process of law, in violation of Sec. 30, Art. II of the Constitution of Missouri, Mo.St.Ann., and the Fourteenth Amendment of the Constitution of the United States.'

There seems to be a difference of opinion among the courts of the land on the question in the Rothrum case and in the present case, and of this we said in the Rothrum case: 'The majority rule is that such an agreement is void, on grounds of public policy. For cases see 70 A.L.R. 975 note; 118 A.L.R. 1458 note; see also Orthwein v. St. Louis, 265 Mo. 556, 178 SW 87 and cases cited; 46 C.J. 1027, sec. 275; 43 C.J. 702, sec. 1173; 19 R.C.L. 920, sec. 200; 22 R.C.L. 537-541; Sec. 234-239; 2 McQuillin, Municipal Corporations [2d Ed.] 330, sec. 542; Throop's Public Officers, secs. 52 and 456; Mechem on Public Officers, sec. 377. Cases showing the minority view, upon which respondents rely, will also be found in these A.L.R. notes.'

It is further said in the Rothrum case that 'an even more vital ground is that public office, and compensation therefor, is not and must not become a matter of contract. Mechem on Public Officers, secs. 463 and 855. Public offices and positions belong to the people and not to officers upon whom they confer appointive

power. 22 R.C.L. 377-379, secs. 9-11. The qualifications, tenure, and compensation thereof must be determined by the people or the people will lose control of their government. This must be done by the representatives the people have authorized to act for them, unless the people themselves have determined these matters by writing them into the Constitution. If the people have not thus themselves determined them, then under our Constitution and theory of government, these are legislative powers. Merchants' Exchange of St. Louis v. Knott, 212 Mo. 616, 111 SW 565; Throop's Public Officers, secs. 19 and 443-444.'

The office of deputy county assessor is a recognized public office and the legislature has fixed the compensation to be received by the holder of such office, and the legislature, Sec. 3939, R.S. 1929, Mo.St.Ann. §3939, p. 2759, has made it a crime for anyone seeking election to any 'office of honor, trust or profit' to 'offer or promise to discharge the duties of such office for a less sum than the salary, fees or emoluments of said office, as fixed by the laws of the state.'

[1] The public policy of a state is determined by 'its statutes and when they have not * * * spoken, then in the decisions of the courts.' In re Rahn's Estate, 316 Mo. 492, 291 SW 120, 123, 51 A.L.R. 877. The very highest evidence of the public policy of any state is its statutory law.' In re Rahn's Estate, supra, 291 SW 1.c. 123, and cases there cited."

In view of the fact situation and finding of law set forth above in what is referred to as the "Rothman case," it becomes unnecessary for us to further analyze this case, which is State v. Darby, 137 SW2d 532.

In an opinion, a copy of which is enclosed, rendered September 20, 1955, to Richard K. Phelps, Prosecuting Attorney of Jackson County, this department held that the county court of Jackson County could be compelled to pay the increased salary of employees of the prosecuting attorney's office, which salaries were fixed by statute.

Honorable J. Allen Gibson

In an opinion rendered November 29, 1957, a copy of which is enclosed, to Garner L. Moody, Prosecuting Attorney of Wright County, Missouri, this department held that deputy county clerks in fourth class counties were entitled to the \$500 per year additional compensation set forth by statute, and that the chief deputy circuit clerk, also the first and second deputies in fourth class counties, should be paid the amount of salary fixed by statute.

These two opinions are not primarily written upon the issue involved in the instant case, but, like the first two cases cited and analyzed above, are, we believe, persuasive of the issue here involved.

CONCLUSION

It is the opinion of the department that an employee who has been classified as a first deputy of the circuit clerk and recorder, under Section 384.380, RSMo, C. S. 1957, in a fourth class county whose population brings it within the purview of subsection 2, Section 483.382, cannot by agreement or otherwise be paid less than the amount set forth in subsection 2, supra.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

Enclosures
HPW:ar

TOWNSHIP AUDITS:

The State Auditor will audit the books and accounts of a municipal township when requested to do so by 5% of the qualified voters of such township determined on the basis of votes cast for the office of Governor in the last preceding election. The actual cost of such audit to be paid by the township.

October 10, 1960



Mr. William E. Gladden
Prosecuting Attorney
Texas County
Houston, Missouri

Dear Sir:

Your recent request for official opinion reads:

"Texas County is a township organization county and I have had inquiry from some of the members of a township board with regard to what is necessary to obtain an audit of the books of the Township Treasurer of this particular township. The information they have furnished me would definitely indicate there should be an audit of such books.

First: Will the office of the State Auditor conduct an audit of township books?
Second: If the office of the State Auditor will conduct such an audit, who must make the request? Also, would the audit be at state expense or who would have to pay the audit expense?
Third: If the State Auditor's office will not conduct the audit, what steps must be taken by what officials to affect such an audit?

I have had several inquiries from the officials involved and they are quite anxious to get some action on this matter, therefore your prompt attention to this matter would be appreciated by this office."

Mr. William E. Gladden

In regard to the above we direct your attention to Section 29.230, RSMo 1949, which reads:

"At least once during the term for which any county officer is chosen, the state auditor shall examine, inspect, and audit the accounts of the various county officers of the state supported in whole or in part by public moneys, and without cost to the county, county clerks, circuit clerks, recorders, county treasurers, county collectors, sheriffs, public administrators, probate judges, county surveyors, county highway engineers, county assessors, prosecuting attorneys, county superintendents of schools, in every county in the state which does not elect and have a county auditor. Such audit shall be made by the state auditor as near the expiration of the term of office as the auditing force of the state auditor will permit. Such audit shall be made in counties having a county auditor whenever qualified voters of the county to a number equal to five per cent of the total number of votes cast in said county for the office of governor at the last election held for governor preceding the filing of such petition shall petition the state auditor for such audit, but such counties shall pay the actual cost thereof into the state treasury; provided, that any county having an audit by petition shall not be audited more than once in any one year. He shall audit any department, board, bureau or commission of the state which is under the control or supervision of the governor or any other elected official of the state, upon the request of the governor, and he shall further audit any political subdivision of the state whenever requested to do so by five per cent of the qualified voters of such political subdivision, determined on the basis of the votes cast for the office of governor in the last election held. Such political subdivision shall pay the actual cost thereof; provided that no political subdivision shall be so audited by petitions more than once in any one calendar or fiscal year. (L. 1945 p. 584 § 21, A. 1949 S. B. 1012)

From the underlined portions of the above Section you will note that under the circumstances set forth therein the State Auditor will audit the books of and accounts of "any political

Mr. William E. Gladden

subdivision of the state". The question therefore, is whether a township is a political subdivision.

We believe it to be a political subdivision.

In the case of Grand River Township, DeKalb County, vs. Cooke Sales and Service, Inc. 267 S.W. 2d, 322, the Missouri Supreme Court stated (l.c. 323 [1]):

"Plaintiff had verdict and judgment for \$2,213.60, paid by it to defendant on a contract of sale of a used motor road grader, submitted on the theory of rescission of the contract. Defendant has appealed. We have jurisdiction because plaintiff is a political subdivision of the State. Section 3, Art. 5, 1945 Const. V.A.M.S.; Harrison and Mercer County Drainage District v. Trail Creek Tp., 317 Mo. 933, 297 S.W. 1."

In the Harrison case referred to above the Missouri Supreme Court in part (Harrison and Mercer County Drain. District v. Trail Creek Township, 297 S. W. 1.) (l.c. 4 [1]):

"The general township organization law aforesaid, enacted by the General Assembly pursuant to the aforesaid constitutional authority, plainly contemplates the organization or creation of the township as a separate and distinct unit of government, or, in other words, as a political (i.e., governmental) subdivision of the state. The township organization law provides for a distinct and separate government of the township, as a unit of government, in those counties of the state voting to adopt the township organization plan. It provides for the election of certain township officers and prescribes their governmental duties, powers, and authority. It provides for the assessment, levy and collection of the revenue in such organized townships, not only to defray the usual and ordinary township governmental charges and expenses but also for road and bridge uses and purposes. In other words, the general township organization law, and the constitutional authority under which such general law was enacted, in our judgement and opinion, contemplates and provides for the creation of a separate and distinct unit of government, known as an organized township, having certain governmental powers and charged with certain

Mr. William E. Gladden

governmental obligations and duties similar to those of a county. Hence, we think that the framers of our Constitution of 1875, when they wrote into Section 12, art. 6 of said Constitution, that the Supreme Court shall have exclusive jurisdiction on appeal, 'in cases where a county or other political subdivision of the state * * * is a party,' must have had in mind in the use of the words 'or other political subdivision of the state', that the General Assembly, pursuant to the authority granted by section 8, art. 9, of the same Constitution, might or would provide, by general law, for the creation of the organized township as a unit of government, separate and distinct from the county."

CONCLUSION

It is the opinion of this department that the State Auditor will audit the books and accounts of a municipal township when he is requested to do so by 5% of the qualified voters of a township, determined on the basis of votes cast for the Office of Governor in the last preceding election, the actual cost of such audit to be paid by the township.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HP W:ms

ELECTIONS:

Under general election laws, county court must establish at least one voting place in each township.

August 12, 1960



Honorable Bernard W. Gorman
Prosecuting Attorney
Atchison County
Tarkio, Missouri

Dear Mr. Gorman:

This office is in receipt of your request for a legal opinion which reads as follows:

"May a County Court of a third class county combine two or more voting precincts which are located within the boundaries of two different townships?

"Atchison County does not have Township Government."

Your further letter with regard to this matter reads as follows:

"My question has to do with the elimination of all voting precincts in a given township and resulting in voters in that township being forced thereby to go into another township to vote.

"That is, it would be an effort on the part of the County Court to re-align precincts but would result in no voting place within certain townships."

We assume that the question asked in the opinion request has to do with the establishment of election precincts under the general election laws and has no reference to consolidation of precincts authorized for certain special elections.

Honorable Bernard W. Gorman

Section 111.220, RSMo 1949, provides for the establishment of election districts and precincts and reads as follows:

"The county courts of the several counties in this state shall have power to divide any township in their respective counties into two or more election districts, or to establish two or more election precincts in any township, and to alter such election districts and precincts, from time to time, as the convenience of the inhabitants may require."

Section 111.060, RSMo 1949, sets out the qualifications of voters of this state in detail, among which is found the following requirement:

"* * * Each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides. * * *"

From the provisions of Section 111.060, supra, it is clear that under the general election laws of the state a person is authorized to vote only in the township in which he resides. Clearly, then, each township must contain at least one place at which votes may be cast in order that a voter may be enabled to vote in the township in which he resides. Therefore, it follows that the county court has no power to designate voting precincts so that there is no voting place in a township.

CONCLUSION

It is the opinion of this office that the county court, in designating election precincts under the general election laws of the state, must establish at least one place at which votes may be cast in each township.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON
Attorney General

PNC:mc

PUBLIC HEALTH NURSE:

COUNTY COURT:

When a petition signed by 250 taxpayers of a county requesting the appointment of a public health nurse is presented to the county court, it is mandatory upon the court to make such appointment.

July 11, 1960



Honorable Charles E. Hansen
Prosecuting Attorney
Franklin County
Union, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"A petition signed by more than two hundred fifty taxpayers has been presented to the County Court of Franklin County with the intention of forcing the County Court to employ a county health nurse under their interpretation of Section 192.160 Revised Statutes of Missouri 1949. Further, the Court doubts that the wishes of the petitioners represent the feeling of the majority of the citizens of the County. Your opinion is requested.

"QUESTIONS:

1. Assuming that the petition is in due form and the signatures valid, and there being no emergency, epidemic or places in need of disinfection, is it mandatory that the Court appoint a health nurse.

2. Does the County Court have the authority to poll the voters of Franklin County at the next General Election by placing on a ballot the question, the gist of which would be, whether or not the voters favor the establishment of a permanent public health nurse for Franklin County?"

Section 192.160, V.A.M.S. 1949, reads:

"In case a petition is signed by two hundred and fifty taxpayers and presented to any city

Honorable Charles E. Hansen

council of the second, third or fourth class or any county court, asking for the appointment of a public health nurse or nurses or that any place infected with infectious or contagious disease be disinfected, as designated in section 192.140, it shall be the duty of said city council or county court, as the case may be, to provide for the appointment of said nurse or nurses and for the disinfecting of any infected place and to pay for the same as provided for in section 192.170."

It would appear to us that under the circumstances set forth in your letter, in the light of Section 192.160, supra, that it is mandatory upon the county court to appoint a public health nurse. It will be noted that the statute states that when a petition is signed by two hundred fifty taxpayers and presented to any county court asking for the appointment of a public health nurse, it then "shall be the duty" of the county court to provide for the appointment of said nurse. In the case of State v. Wurdeman, 246 SW 189 (1.c. 194 [6, 7]), the Missouri Supreme Court stated:

"* * * Usually the use of the word 'shall' indicates a mandate, and unless there are other things in a statute it indicates a mandatory statute. Especially is this true in a statute calling for strict construction."

In the case of State v. Wade, 231 SW2d 179 (1.c. 181 [1, 2]), the Missouri Supreme Court stated:

"There can be no question about the mandatory character of these statutes. Section 13827 says that each year 'the county court of each county in this state shall prepare and publish * * * a detailed financial statement of the county for the year ending December 31, preceding.' The requirements of the statement are set out in this statute with particularity and Section 13828 provides that 'the court shall forward one proof (of publication of this statement) to the state auditor' and obtain his approval 'that it complies with the requirements of this section' before paying for its publication or preparation.* * *"

Honorable Charles E. Hansen

For the above reasons we believe that the answer to the first question is in the affirmative. Since that is our opinion, the answer to your second question is necessarily in the negative because the proposed procedure as set forth in your second question would contemplate a disregard of the law as set forth in Section 192.160, supra.

CONCLUSION

It is the opinion of this department that when a petition signed by two hundred fifty taxpayers of a county requesting the appointment of a public health nurse is presented to the county court, it is mandatory upon the court to make such appointment.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:bw

NURSING HOMES:
LICENSE FEES:

The only fee required to be paid by the operator of a nursing home is a fee for a license to operate. A license to operate a nursing home should be issued and dated as of the time the home was found acceptable for licensure.

February 25, 1960



H. M. Hardwicke, M. D.
Deputy Director
Division of Health
Jefferson City, Missouri

Dear Dr. Hardwicke:

Your recent request for an official opinion reads:

"At the time that the nursing home licensing law was implemented in the State of Missouri, a very small percentage of the operating homes were immediately eligible for license. Many operators sent the fee necessary under the law for the issuance of a permit to the Division of Health before they were eligible for licensure. Monies received in this fashion were deposited by the Division of Health to the nursing home licensing fund.

"There has arisen a question in relation to the nursing home licensing law upon which we respectfully request your opinion. Is it incumbent upon the operator of a nursing home to pay a yearly fee for the privilege of operating such home or is the fee paid for the privilege of receiving a license to operate?

"This question, therefore, breaks down into two parts:

"1. The operator of a nursing home submits the appropriate fee for a license to the

H. M. Hardwicke, M. D.

Division of Health. If personnel of the Division of Health find that the nursing home in question is not immediately eligible for licensure, the operator of the home is cooperating and attempting to improve to the point where it may be licensed, the fee is held by the Division of Health. After a period of one year the home becomes licensable. Should the Division of Health re-bill the operator for an additional annual fee even though no license could be issued during the preceding twelve months?

"2. A home applies for a license and is found ineligible, but capable of becoming eligible. After the passage of a certain amount of time, the home is found eligible for licensure. Should the license be issued and dated as of the time the fee was submitted or should the license be dated as of the time the home was found acceptable for licensure?

"This second question is of importance both to the nursing home operator and to the Division of Health. If a home is found ineligible because of its own shortcomings for license and there occurs during the period of time which the home is unlicensed a regrettable incident which may provoke civil action against the operator, the operator feels that he has less protection against such civil action than he would have had, had the license been issued retroactive to the date of application.

"This second question is important to the Division of Health since the nursing home licensure fund would be increased were we in a position to re-bill the operator."

That portion of the law relating to licenses for nursing homes and the payment of license fees is found in Sections 198.021 through 198.031, MoRS Cum. Supp. 1957. These sections read:

198.021

"After ninety days from the date this law becomes effective, or at the expiration of any license issued under a prior law, no person shall establish, conduct or maintain a nursing, convalescent or boarding home in this state without a license issued under this law by the division of health of the department of public health and welfare."

198.025

"1. A license unless sooner revoked or suspended shall be renewable annually upon receipt of the annual license fee from the licensee and approval for renewal by the division of health.

"2. Each license shall be issued only for the premises and persons named in the application and shall not be transferable or assignable, except with the written approval of the division of health. A separate license shall be required for homes maintained in separate premises, even though operated under the same management, provided a separate license shall not be required for separate buildings on the same grounds.

"3. Licenses shall be posted in a conspicuous place on the licensed premises."

198.031

"1. Application for a license shall be made to the division of health upon forms provided by it. The application shall be under oath and shall contain:

(1) The name and address of the applicant if an individual, and if a firm,

H. M. Hardwicke, M. D.

partnership or association, of every member thereof, and in the case of a corporation the name and address thereof and its officers;

(2) The location of the home for which a license is sought;

(3) The name of the person or persons under whose management or supervision the home will be conducted;

(4) The number and type of residents for which maintenance, care or nursing is to be provided; and

(5) Such information relating to the number, experience and training of the employees of the home and the moral character of the applicant and employees as the division may deem necessary.

"2. Each application shall be accompanied by a statement relative to the financial status of the applicant, and in areas having a zoning law or ordinance, a statement from the local authorities having jurisdiction that the home's location does not violate the zoning law or ordinance.

"3. Upon approval an annual license fee of twenty-five dollars for establishments with less than fifty beds and fifty dollars for establishments with fifty beds or more shall be paid to the collector of revenue and deposited in the state treasury to the credit of the nursing home licensing fund, which is hereby created. The nursing home licensing fund shall be subject to appropriations by the general assembly which, together with any appropriations from general revenue, shall be used for the purpose of carrying out this law."

From the above law it would seem to us clear that the fees of \$25 and \$50 required to be paid for the operation of various

H. M. Hardwicke, M. D.

sizes of nursing homes, set forth in numbered paragraph 3 of Section 198.031, supra, are payment for the license. There is no provision whatever in the law for, as you state in your letter, "the privilege of operating such home", separate and apart from the fee paid for the license.

Therefore, the answer to your first question would be that money which has been received by the Division of Health from the applicant for a license, which fee has been held by the Division for the period of a year without the issuance of a license, should be regarded as money tendered for a license. Certainly the Division of Health should not re-bill the operator for an additional annual fee.

In regard to your second question, it would be our thought that there was no ground for issuing and dating a license as of the time the fee was submitted but rather that the license should be issued and dated as of the date the home was found acceptable for licensure.

CONCLUSION

It is the opinion of this department that the only fee required to be paid by the operator of a nursing home is a fee for a license to operate. It is the further opinion of this department that a license to operate a nursing home should be issued and dated as of the time the home was found acceptable for licensure.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

HPW:mlw,vlw

DEAD HUMAN BODIES:
REMOVAL OF:
DIVISION OF HEALTH:
PERMIT:
DISINTERMENT:

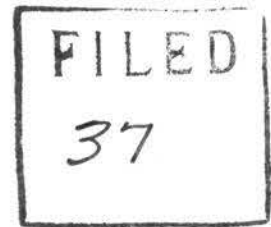
1. State Health Department or district health department or local board of health may issue permit authorizing a disinterred human body to be transported or removed to another cemetery for reinterment. 2. State Department of Health or any local board of health does not have authority to issue permits for disinterment of dead human body once interred.

October 28, 1960

COPY

OPINION NO. 37

Dr. H. M. Hardwicke
Acting Director
Division of Health
State Office Building
Jefferson City, Missouri



Dear Dr. Hardwicke:

In your letter of September 15, 1960, you request an opinion on two questions you submit, to wit:

"1. Our first question, therefore, is: Could the Division of Health through its district health officers issue permits for the removal of disinterred bodies in those areas where there is no local board of health or health department?

"2. The second question is: In the past, it has been presumed by funeral directors that a permit is needed to disinter a human body, the permit usually being obtained from a local board of health or health department or by inquiry being made of the Division of Health as to the procedure to be used in those areas which do not have a local health department. I would like to know if it is necessary that the local boards of health or health departments or the Division of Health concern themselves with routine disinterment permits, as differentiated from a permit for removal of a disinterred body."

You also refer to Section 194.030, V.A.M.S., apparently for our consideration and construction. This section is part of Chapter 194, V.A.M.S., which consists of eleven sections that were enacted in 1909 and found in Laws of Missouri, 1909, page 664. These sections are in substantially the same language as first enacted.

Honorable H. M. Hardwicke, M.D.

In order to properly construe Section 194.030, supra, it is necessary to consider it with the other sections in the chapter and arrive at the intent and purpose of its enactment.

This chapter deals with the preparation and transportation of dead human bodies. It was enacted to protect the public health of the danger caused by transporting dead human bodies when death was caused by infections, communicable, contagious or dangerous diseases.

Section 194.010, V.A.M.S., provides as follows:

"A disinterred human body, dead of a disease or any cause, will be treated as infectious and dangerous to the public health, and shall not be offered to or accepted by any common carrier for transportation unless it is encased in an airtight metal or metal-lined burial case, coffin, casket or box that is closed and hermetically sealed."

Section 194.030, V.A.M.S., provides as follows:

"No disinterred human body shall be removed from one cemetery to another without a permit first having been obtained from the local board of health or health department of the district wherein said body shall have been interred."

The word "disinter" means to unbury; to take out of a grave; to exhume. Words and Phrases, Volume 12A.

When these sections are considered together with the other sections in the chapter, it seems clear that the intent and purpose of Section 194.030, supra, is to require a permit for the transportation of a dead human body after it has been exhumed or disinterred, which body is presumed to be contagious or infectious under Section 194.010, supra. It is the transportation of such a body that is dangerous to the public health. Section 194.030, supra, does not and was not intended to authorize the issuance of a permit to disinter. Said section deals only with the transportation of a body after it has been disinterred.

Regarding your question as to who should issue the permit in areas of the state which do not have a local board of health or health department, other statutory provisions concerning the State Board of Health would have to be considered. When Section 194.030, enacted in 1909, Section 6653, RSMo 1909, provided for a state board of health composed of seven members who were charged

Honorable H. M. Hardwicke, M.D.

with the general supervision of the health of all the citizens of the state, the only authority it had was to recommend to the different municipalities in the state and to the county boards of health the adoption of rules and regulations for the protection and preservation of the health of the people. Other statutes provided for municipalities to establish local boards of health or health departments if they so desired. By express provisions of the statutes there was created in each county a county board of health, composed of the judges of the county court and a physician appointed by the court, which had jurisdiction over areas not included in the municipalities. Therefore, when Section 194.030, supra, was enacted, there was a county board of health in each county and there were also local boards of health in the cities and municipalities which may have established a health department. There was no provision for district boards of health or health departments.

Since 1909 the statute which created a county board of health has been repealed. At the present time a county health officer may be appointed by the county court. Section 192.260, V.A.M.S. However, this provision is not mandatory, so it is possible, and we are informed, many counties in the state do not have a health officer or local board of health. There is also statutory provision for municipalities to establish health departments if they so desire.

Section 192.020, V.A.M.S., provides as follows:

"It shall be the general duty and responsibility of the division of health to safeguard the health of the people in the state and all its subdivisions. It shall make a study of the causes and prevention of diseases. It shall designate those diseases which are infectious, contagious, communicable or dangerous in their nature and shall make and enforce adequate orders, findings, rules and regulation to prevent the spread of such diseases and to determine the prevalence of such diseases within the state. It shall have power and authority, with approval of the director of public health and welfare, to make such orders, findings, rules and regulations as will prevent the entrance of infectious, contagious, and communicable diseases into the state."

It should be observed that, under the above-quoted statute, the State Division of Health has been vested with the power and authority to make and enforce orders, findings, rules and regulations to prevent the spread of infectious, contagious, com-

Honorable H. M. Hardwicke, M.D.

municable and dangerous diseases. This is a much broader power than that possessed by the State Board of Health in 1909.

It is our opinion that the State Division of Health, through its officers and designated employees, is authorized by Section 192.020, supra, to issue the permit required under Section 194.030.

Section 193.280, V.A.M.S., provides as follows:

"When a death or stillbirth occurs or a dead body is found the body shall not be disposed of or removed from the registration district until a permit has been issued by the local registrar."

This section governs the disposition of dead human bodies prior to burial. It does not apply or have anything to do with the disinterment of a human body once interred.

We are unable to find any statutory authority for the State Division of Health or local boards of health or health department or district health department to issue a permit authorizing the disinterment of human bodies.

CONCLUSION

In answer to your first question, it is our opinion that the State Division of Health, by its officers or designated employees, where there is no local board of health or health department, may issue the permit required under Section 194.030, V.A.M.S., to transport a disinterred human body from one cemetery to another.

In answer to your second question, it is our opinion that local boards of health or health departments or the State Division of Health need not concern themselves with the issuance of disinterment permits.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,

JOHN M. DALTON
Attorney General

DIVISION OF HEALTH:
REGULATIONS REGARDING
SANITATION IN SLAUGHTER-
ING PLANTS:

The regulations submitted by the Division of Health regarding sanitation in slaughtering houses are compatible with the laws of Missouri; the Division of Health is authorized to promulgate such regulations, and such regulations are legal.

November 3, 1960

H. M. Hardwicke, M. D.
Acting Director
Division of Health
State Office Building
Jefferson City, Missouri

37

Dear Dr. Hardwicke:

Your request of April 25, 1960, for an official opinion reads:

"Enclosed are drafts of two publications proposed for reproduction and distribution by the Division of Health. The publications are: 'Regulations and Code Governing Sanitation in Slaughtering Plants,' and 'Regulations Governing the Production and Handling of Fluid Milk and Fluid Milk Products.'

These will be filed with the Secretary of State as Division of Health Regulations.

Your review of the drafts is requested and your comments solicited in regard to the legality of the documents and the authority of the Division of Health to promulgate regulations in each specific field."

Subsequent to writing the above letter you requested us to delay an answer pending discussion between your Department and the Department of Agriculture. Recently you have informed us that you do not desire our opinion regarding the regulations governing the production and handling of fluid milk and fluid milk products but that you do want our opinion with respect to the proposed regulation governing sanitation in slaughtering plants.

H. M. Hardwicke, M. D.

We will first consider the matter of the authority of this Division to make such regulations. Section 196.045, numbered paragraph 1 which reads:

"1. The authority to promulgate regulations for the efficient enforcement of sections 196.010 to 196.120 is hereby vested in the division of health. The division shall make the regulations promulgated under said sections conform, insofar as practicable, with those promulgated under the federal act."

From the above it will be noted that the Division of Health is given authority to promulgate regulations with respect to section 196.070, Numbered paragraph 1, 2, 3 and 4 which reads:

"A food shall be deemed to be adulterated:

"(1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this subdivision if the quantity of such substance in such food does not ordinarily render it injurious to health; or

(2) If it bears or contains any added poisonous or added deleterious substance which is unsafe within the meaning of section 196.085; or

(3) If it consists, in whole or in part, of any diseased, contaminated, filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or

(4) If it has been produced, prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth or whereby it may have been rendered diseased, unwholesome, or injurious to health; or"

Certainly the preparation of meat in a slaughtering plant for human consumption would bring it within the province of section 196.070, supra. It would appear therefore that the Division of Health would have authority to promulgate regulations with respect to sanitation in slaughtering plants. The question before us therefore is whether the regulations submitted by you to us are such as can legally be made by you. To determine this matter we must look first to the law governing the regulation making power of administrative bodies such as the Division of Health.

We first direct attention to Section 94, page 413 et seq, C. J. S. Vol. 73 which reads:

"Inasmuch as the rule-making power of a public administrative body is a delegated legislative power, which it may not use either to abridge the authority given it by the legislature or to enlarge its powers beyond the scope intended by the legislature, statutory provisions control with respect to what rules and regulations may be promulgated by such a body, as well as with respect to what fields are subject to regulation by it. While a public administrative body may have the authority to make or adopt rules and regulations designed to carry out the duties imposed on it and to effectuate the purpose of the enactment under which it operates or which it is administering the rule-making power of such a body must exist within the framework of the statute creating it, and it must accord therewith, and with the policy indicated therein.

A public administrative body may make only such rules and regulations as are within the limits of the powers granted to it and within the boundaries established by the standards, limitations, and policies of the statute giving it such power, and it may go no further than to make administrative rules and regulations which fill in the interstices of the dominant enactment. It may make only rules and regulations which effectuate a law already enacted, and it may not make rules and regulations which are inconsistent with the provisions of a statute, particularly the statute it is administering or which created it, or which are in derogation of, or defeat, the purpose of a statute, and it may not, by its rules and regulations, amend, alter, enlarge, or limit the terms of a legislative enactment."

We would next direct attention to the case of *ex parte Williams* 139 S.W. 2d 485. In that case the Missouri Supreme Court stated (1.c. 491 [12]):

"A legislative body cannot delegate its authority but alone must exercise its legislative functions. 12 C. J. 839; 6 R.C.L. 175. It may empower certain officers, boards, and commissions to carry out in detail the legislative purposes and promulgate rules by which to put in force legislative regulations. It may provide a regulation in general terms and may define certain areas within which certain regulations may be imposed, and it may empower a board or a council to ascertain the facts as to whether an individual or property affected come within the general regulation or within the designated area.' *Cavanaugh v. Gerk*, 313 Mo. 375, 280 S. W. 51, loc. cit 52."

H. M. Hardwicke, M. D.

Also to the case of McCreery V. Ijams, 59 N. E. 2d 133, a case decided by the Appellate Court of Indiana. In that case the court stated (1.c. 136 [3-5]):

"The State Board of Tax Commissioners does have statutory authority to make rules and regulations to carry out the purposes for which it is constituted, Burns' 1943 § 64-1309 and § 64-1309 and § 64-2826, but it has no authority to enact law or add to or detract from the law as enacted, nor may it by rule extend its powers beyond those conferred upon it by law."

Also to the case of California employment Commission v. Bowden 126 P. 2d 972. In that case the Superior Court of Santiago California stated (1.c. 979 [5-7]):

"In the absence of constitutional provision therefor it is now settled that administrative bodies in this State having state-wide functions are devoid of judicial powers. The Commission's rules are valid in so far as they are in line with the terms of the Act and no farther. They are impotent to change the clear meaning of such terms."

Also to the case of State vs. Public Service Commission 225 S.W. 2d, In that case the Kansas City Court of Appeals stated (1.c. 794 [1]):

"[1] However, the adoption of such a rule by respondent can only be legally authorized upon the grounds that the Legislature has directly, or by necessary or reasonable implication, authorized the same. Respondent has no power except that granted by its creator. Missouri Valley Realty Company v. Cupples Station Light, Heat & Power Company, Mo. Sup., 199 S. W. 151, loc. cit. 153; Ex parte Williams, 345 Mo. 1121, 139 S.W. 2d 485, loc. cit. 491."

From all of the above it would appear that an administrative body may not enact regulations which alter, enlarge, or limit the terms of a statute.

We must now consider the law regarding sanitation in slaughtering houses in the light of the regulations submitted to you to determine whether such regulations do in any particular alter, enlarge, or limit the existing law regarding sanitation in slaughtering houses. This law is found in Section 196.190 RSMo 1949 through 196.265 and applies equally to numerous other food

H. M. Hardwicke, M. D.

handling establishments.

We have carefully examined each item of the regulations submitted by you and have checked such items against the above provisions of the statutory law relating to slaughtering houses and do not in any instance find that the aforesaid regulations alter, amend, enlarge or make less the aforesaid statutory law, but that on the contrary the aforesaid regulations simply make more definite and applicable the provisions of the aforesaid law and serve to implement it.

CONCLUSION

It is the opinion of this department that the regulations submitted by the Division of Health of Missouri regarding sanitation in slaughtering houses are compatible with the laws of Missouri, that the Division of Health is authorized to promulgate such regulations and that such regulations are legal.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:ms

CITY ASSESSOR: The same person may, simultaneously, hold the
CITY CLERK: offices of city assessor and city clerk in a
COMPATIBILITY: city of the fourth class.

May 2, 1960

#137

Honorable Phil Hauck
Prosecuting Attorney
Grundy County
Trenton, Missouri



Dear Mr. Hauck:

I have your opinion request of April 14, 1960, which reads:

"In a city of the fourth class may the offices of city assessor and city clerk be filled by one and the same individual?"

The law in Missouri regarding the holding of more than one office by the same individual at a given time, has been discussed in a number of opinions rendered by this department, and the general principles regarding this matter have been set forth. We enclose a copy of an opinion rendered June 10, 1955, to J. Ellis Dodds, Representative, Pulaski County, Waynesville, Missouri, which sets forth these principles.

This department has not rendered any opinion dealing specifically with the offices of city assessor and city clerk. We have, however, noted the duties set forth by statute with respect to these offices as we note that you have done with respect to the city clerk, whose duties are set forth in Section 79.320, RSMo 1949, which section is set forth in your above letter.

Numbered paragraphs 1 and 2 of Section 94.190, RSMo 1949, set forth the duties of a city assessor in a fourth class city. These paragraphs read:

"1. In cities of the fourth class, the city assessor, jointly with the county assessor, shall assess all real and personal property in the city, and the assessment so made, after being passed upon by the board of equalization, shall be the basis upon which the board of aldermen shall make the levy for city purposes.

"2. The assessments of city property made by the city and county assessors shall conform to each other and

Honorable Phil Hauck

after the board of equalization has passed upon and equalized the assessment, the city assessor's books shall be corrected in red ink in accordance with the changes made by the board of equalization and so certified by the board and returned to the board of aldermen."

An examination of the duties of a city clerk in a fourth class city and a city assessor in such a city do not reveal to us any conflict in duty or any incompatibility, and we, therefore, believe that the same person may hold both offices at the same time.

CONCLUSION

It is the opinion of this department that the same person may, simultaneously, hold the offices of city assessor and city clerk in a city of the fourth class.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:ar
Enclosure

COUNTY AGRICULTURAL
EXTENSION COUNCIL:
THIRD AND FOURTH CLASS
COUNTIES:

Office furniture, machines and equipment under control of county agricultural extension council, the purchase price of which is paid from appropriations of third or fourth class county to council, under Sections 262.591 and 262.601, RSMo Cum Supp 1957, is property of council. Said property shall not be included in annual inventory of county property required to be reported by county clerk of third or fourth class county under Section 51.155 RSMo Cum. Supp. 1957.

December 21, 1960



Honorable Haskell Holman
State Auditor
Capitol Building
Jefferson City, Missouri

Dear Mr. Holman:

This office is in receipt of your request for a legal opinion upon the following inquiries:

- "1. Is a county the owner of machines and office equipment under the control of a county Agricultural Council?
2. Should such machines and office equipment be included in the inventory as made and reported by the county clerk under the provisions of Section 51.155, 1957 Cumulative Supplement?"

Section 51.155, RSMo Cum. Supp. 1957, referred to in the second inquiry requires the county clerk of a third or fourth class county to inspect buildings and personal property of the county, to make an inventory of such property and to file same in the Clerk's office as a public record.

Because of the reference to this section and an oral communication with your office subsequent to the opinion request indicating the present inquiries were made regarding third and fourth class counties, the within opinion shall apply only to third and fourth class counties.

Honorable Haskell Holman

Before attempting to discuss and answer the inquiries of the opinion request, it must first be ascertained what kind of organization the county agricultural extension council is and whether or not it is a separate legal entity from the county. If the council is in reality a part of the county organization then its members are either employees or elected or appointed officials of the county, and have some statutory duties to perform in carrying out the governmental functions of the county, as a political subdivision of the state. In that instance answers to both of the above inquiries could be given in the affirmative.

All statutory references herein are to RSMo Cum. Supp. 1957 unless otherwise indicated.

Section 262.561 sets out statutory procedure for organization of a county agricultural extension council and reads as follows:

"The citizens of voting age residing in each of the several townships of each county shall meet not earlier than October first and at least ten days before the annual meeting of the county agricultural extension council upon a date and at a time and place determined and fixed by the executive board and shall elect from among their number one man and one woman to be members of the county agricultural extension council. The date, time and place for the meeting for the year 1955 shall be fixed by the University of Missouri. The members so elected in the several townships shall constitute the county agricultural extension council. Members of the county agricultural extension council shall hold office for a term of two years and until their successors are elected and qualified, and no member shall hold office for more than two consecutive terms. In the elections held in 1955 one member from each township shall be elected for a two-year term and one member for a one-year term. Vacancies in the council membership shall be filled by election."

Honorable Haskell Holman

Section 262.581 states the kind of official body the county agricultural extension council shall be considered under the Federal law and reads in part, as follows:

"1. The county agricultural extension council shall be recognized as the official body within the county to cooperate with the University of Missouri in carrying out the provisions of the Smith-Lever Act of Congress, approved May 8, 1914, and acts supplementary thereto."

Section 262.591 authorizes the county courts to make appropriations for county extension work, and reads as follows:

"1. The county agricultural extension council, in cooperation with the county court and the University of Missouri, shall prepare an annual financial budget covering the county's share of the cost of carrying on the instruction in agriculture, home economics and 4-H club work provided for in sections 262.551 to 262.611, which shall be filed with the county court and included in class four of the budget of county expenditures for such year in counties budgeting county expenditures by classes and in the budget document in all other counties, subject to the following minimum appropriations:

"(1) In counties of the first and second classes, ten thousand dollars;

"(2) In counties of the third class with an assessed valuation of fifteen million dollars or more, five thousand dollars;

"(3) In counties of the third class with an assessed valuation of less than fifteen million dollars, two thousand five hundred dollars;

"(4) In counties of the fourth class with an assessed valuation of eight million dollars or more, one thousand five hundred dollars;

Honorable Haskell Holman

"(5) In counties of the fourth class with an assessed valuation of less than eight million dollars, one thousand two hundred dollars;

"2. No county shall appropriate more than one dollar per capita of the rural population as determined by the latest federal decennial census. In any year in which the county agricultural extension council approves a budget of lesser amount than is herein provided, the county court shall appropriate the lesser amount."

In an opinion of this office written for Honorable John E. Downs, Prosecuting Attorney of Buchanan County on October 25, 1951, the status of the county farm bureau relative to the provisions of Substitute for Senate Bill No. 3 of the 66th General Assembly was under discussion. It was stated therein the necessity for such a determination was obvious, in view of the fact the bill provided employees of the state shall be covered under the Old Age and Survivors' Insurance provisions of Title 2, of the Federal Social Security Act, and employees of the political subdivisions or instrumentalities of the state may be covered. On pages 5 and 6 of said opinion it is stated a county farm bureau, as a body corporate is a juristic entity legally separate and distinct from the state and county, and that its employees are not employees of the state or county. The county agents and their employees are not appointed by the state or county and are in no way under their control, neither are they paid by the state or county, but from an appropriation made to the farm bureau and administered by the farm bureau. A copy of said opinion is enclosed for your consideration.

A later opinion of this office to Honorable Newton Atterbury, State Comptroller and Budget Director, on September 26, 1956, was on the inquiry as to whether or not the county agricultural extension council is a political subdivision of the state, or if its employees should be covered under Chapter 105, RSMo Cum. Supp. 1955, which applies to Old Age and Survivors' Insurance.

While it was admitted in the latter opinion the inquiries therein discussed did not pertain to the county farm bureau, but to the county agricultural extension council, yet, the creation, duties, administration, employment of personnel, payment of expenses, and salaries of said employees of the county agricultural extension council were almost identical to those pertaining to the farm bureau. It was believed that the conclusion reached in such

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former opinion was applicable to the latter one and said latter opinion reached the conclusion the county agricultural extension council was an instrumentality, and not a political subdivision (of the state). A copy of said opinion is enclosed for your consideration.

Although the two opinions are on questions relating to the status of the county farm bureau, county agricultural extension council and their employees under the Federal Social Security Law, as well as under applicable state laws, such opinions contain abstract principles of law concerning the status of such organizations, which are believed to be fully applicable to the question as to whether or not the county agricultural extension council is a separate legal entity from the county.

The Missouri farm bureau act was passed by the Legislature in acceptance of the Federal Aid tendered by Congress commonly referred to as the Smith-Lever Act. Practically every state in the Union has accepted the provisions of the act and has enacted laws authorizing the creation of farm bureaus.

The State of Nebraska enacted a county farm bureau law similar to that of Missouri. In the case of State ex rel. Hall County Farm Bureau vs. Miller et al., 178 N.W. 846, the constitutionality of the county farm bureau law was attacked. One of the grounds relied on was that the act delegated authority to an unauthorized body and created new county offices. In discussing and declaring the contention without merit, the Supreme Court of Nebraska said at l.c. 848:

"The act is also assailed as delegating power to an unauthorized body and as creating new county offices. The county farm bureau is a voluntary organization. Its members are not county officers within the meaning of the Constitution. It is not a money-making concern. It is above the aim of pecuniary individual enterprise or official compensation. Its relation to the public is like that of agricultural societies, of which it was said:

"Agricultural societies are not corporations in the ordinary sense of the term, but rather agencies of the state, created for the purpose of assisting in promoting our most important

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industry.' State v. Robinson, 35 Neb. 401,
53 N.W. 213, 17 L.R.A. 383."

In view of what has been stated in the last above-mentioned opinion to the effect that the former opinion concerning the county farm bureau was applicable to the county agricultural extension council, it is believed the excerpt from the Nebraska case on the characteristics of the county farm bureau is equally applicable to the county agricultural extension council.

It will also be recalled that the first-mentioned opinion describes the county farm bureau as "a juristic entity legally separate and distinct from the state and county and whose employees are not employees of the state or county."

Therefore, in view of the foregoing it is believed the county agricultural extension council is not a part of the county governmental organization but that it is a legal entity separate and distinct from the county organization.

The Missouri County Agricultural Extension Laws were enacted in 1955 and by them the council became the successor to the Farm Bureau. At page 19, Laws of 1955, it is provided that on or before January 1, 1956, all money or property purchased for extension purposes and in possession of the county farm bureau became the property of the county agricultural extension council.

Since the council is a separate and distinct legal entity from the county, it acquired title to any farm bureau property to which it succeeded under the Laws of 1955, and the county did not acquire any interest in said property.

Section 262.591, supra, authorizes the county court of a third or fourth class county to make an annual appropriation as the county's share of the expense of the council work in the county.

It is assumed for the purposes of our present discussion the inquiries are concerned with whether or not office furniture, machines and equipment paid for out of the county's appropriation to the county agricultural extension council, and under the control of the council, are county property, and if so, is it required to be inventoried as such under provisions of Section 51.155.

In view of the foregoing and in answer to the first inquiry it is our thought that office furniture, machines or equipment,

Honorable Haskell Holman

under the control of the county agricultural extension council, paid for out of appropriations made to the council, under provisions of Section 262.591, that the council, and not the county, is the owner of all such property.

The second inquiry reads as follows:

"2. Should such machines and office equipment be included in the inventory as made and reported by the county clerk under the provisions of Section 51.155, 1957 Cumulative Supplement?"

Assuming again, the inquiry refers to office furniture, machines and equipment under control of the county agricultural extension council, and paid for out of appropriations of the county, made to the council, under provisions of Section 262.591, all such property belongs to the council and not to the county, for reasons given above. Therefore, our answer to the second inquiry is that such office furniture, machines and equipment shall not be included in an inventory of county property required to be made under provisions of Section 51.155 RSMo Cum. Supp. 1957.

CONCLUSION

Therefore, it is the opinion of this office that office furniture, machines and equipment under control of a county agricultural extension council, the purchase price of which is paid from appropriations of a third or fourth class county to the council, under provisions of Sections 262.591 and 262.601 RSMo Cum. Supp. 1957, are owned by the council.

It is further the opinion of this office that such office furniture, machines and equipment of the county agricultural extension council shall not be included in the annual inventory of county property required to be reported by the county clerk of a third or fourth class county under provisions of Section 51.155 RSMo Cum. Supp. 1957.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,

John M. Dalton
Attorney General

Enc. - John E. Downs, 10-25-51
Newton Atterbury - 9-26-56

COUNTY COURTS:
CONTRACTS:

A letter to a county court by an authorized officer of a construction company, offering to do certain work for the county for the actual cost of labor and materials plus 10%, and an entry made subsequent to the receipt of such letter by the county court accepting such offer, sufficiently constitute a written contract to comply with that requirement of Section 432.070, RSMo 1949, that such contracts "shall be in writing."

February 25, 1960

Mr. John A. Honssinger
Prosecuting Attorney
Laclede County
Lebanon, Missouri



Dear Sir:

Your recent request for an official opinion reads:

"This office respectfully requests an opinion of your office pertaining to the applicability of certain portions of Section 432.070, R. S. Mo., 1949, to the following set of circumstances:

"On December 14, 1959, this office requested an opinion as to whether or not the County Treasurer would be liable on his bond for costs incurred by the County Court for repairs to the Court House in an amount exceeding \$500.00 when there were no bids taken. I received in yesterday's mail a letter from your office, together with the two opinions pertaining to this issue. The opinion to Harold Miller, Prosecuting Attorney of DeKalb County, pertained to the applicability of Section 50.660, R. S. Mo., 1949, and seems to answer a certain phase of my opinion request. However, your letter of January 12, 1960, goes on to state that a conference with members of the County Court of Laclede County determined that no contract in writing was entered into in this situation. Your office then kindly sent me an official opinion formerly issued to Richard Moore concerning this phase of the problem, and the applicability of Section 432.070.

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"I have been advised by our County Court that there were certain written matters pertaining to this situation. I am enclosing a copy of same herewith. These documents include a photostatic copy of a letter from the contractor on this project, Ward Krudwig, to the County Court under date of August 21, 1959. My second enclosure is a certified copy of the record of the County Court referring to Mr. Krudwig's letter. With this information as a background, I would request an opinion as to whether or not the two enclosed documents constitute a sufficient contract in writing to comply with the provisions of Section 432.070."

We first direct attention to Section 432.070, RSMo 1949, which reads:

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

There is no question here of the power of the county court of Laclede County to contract for the work which was done, such contract obviously being within the scope of its powers. Clearly, too, the contract which was made was upon a consideration wholly to be performed or executed subsequent to the making of the contract. Neither is there any question that the work contracted for was done in a satisfactory manner or that the amount to be paid to the contractor was not reasonable and proper.

The only question here involved is whether the contract which was made between the county court of Laclede County and

Mr. John A. Honssinger

the Krudwig Construction Company conformed to that portion of Section 432.070, supra, which requires that such contract shall be "in writing."

What occurred was that the county court, in the proper discharge of its duties as custodian of county property, examined and discovered that repairs needed to be made to a portion of the courthouse. They, thereupon, invited Ward Krudwig of the Krudwig Construction Company to make an examination of the building with the object of determining what would have to be done and the cost thereof of making the necessary repairs. Mr. Krudwig, following an examination of the building, reported to the county court that because of certain conditions existing it was impossible for him to determine how extensive or how costly the repairs would be, and that such determination could only be made after he had gotten well into the work and had discovered conditions existing beneath the outer wall of the building. It is evident from documents to which we shall soon direct attention, that an agreement was reached between Krudwig and the county court that he would make the necessary repairs, whatever they had to be, on a cost plus basis, that is, the cost of the material and labor plus ten per cent. On August 21, 1959, substantiating this oral agreement, Mr. Krudwig wrote as follows:

"Aug. 21, 1959

"Laclede County Court
Lebanon, Missouri

"Gentlemen:

"As per your request and confirming our agreement concerning the repair of the rear wall to the Laclede County Court House. I regret that I can not give you an exact cost for the repairs due to the uncertain conditions I might encounter in removing the bricks and replacing them. I will however do the work as per our agreement which is the cost of all labor, materials, equipment and insurance plus 10%."

Following receipt of the above letter the following action was taken by the county court:

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"Agreement: Krudwig Construction Co.

"As per letter of 8-21-59, Court agrees to let Krudwig Construction Co. repair courthouse wall at cost, plus ten per cent.

"Recorded in Book 4, page 546.

/s/ A. C. Brockman, Presiding Judge
/s/ Henry G. Hooker, Associate Judge
/s/ A. W. Parks, Associate Judge

"Attest: /s/ Preston Schmoutey, County Clerk."

These were all of the written documents pertaining to this contract and the quotation which we have to answer is whether they are sufficient to meet the requirement of Section 432.070, supra, which requires that such a contract as is here under consideration "shall be in writing."

In the first place, we would note that the requirement of the above section that such contracts be in writing is very rigid. In the case of State v. Miller, 297 S.W. 2d 611, the Kansas City Court of Appeals stated (l.c. 614 [1, 2]):

"How do the foregoing facts conform to the requirements prescribed by the law to safeguard the funds of the county? In the first place the law requires such contracts to be in writing. Section 432.070. Absent the required writing, such contracts 'have been held void and performance by the other party ineffectual to create legal liability on the political subdivision on the theory of ratification, estoppel or implied contract [citations].' Elkins-Swyers Office Equipment Co. v. Moniteau County, 357 Mo. 448, 456, 209 S.W. 2d 127, 131. See, also, Carter v. George, 216 Mo. App. 308, 264 S.W. 463; Cook v. St. Francois County, 349 Mo. 484, 162 S.W. 2d 252, 254; Missouri-Kansas Chemical Co. v. Christian County, 352 Mo. 1087, 180 S.W. 2d 735, 736. One dealing

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with the county is deemed to know of such restrictions imposed by law on such transactions. Riley v. City of Rock Port, Mo. App., 165 S.W. 2d 880; Hillside Securities Co. v. Minter, 300 Mo. 380, 254 S.W. 188, 193."

The same holding has been made in the case of Grauf v. City of Salem, 283 S.W. 2d 14 (l.c. 18 [9]); State v. Crain, 301 S.W. 2d 415 (l.c. 419 [4, 5]); Fleshner v. Kansas City, 156 S.W. 2d 706 (l.c. 707 [3]), and many others. While the above cases are absolute in their requirement that a contract such as this shall be in writing they do not go very much into the matter of what writing, in what form and kind such a contract must be.

In regard to this phase of the matter we direct attention to the case of Burger v. City of Springfield, 323 S.W. 2d 777, an opinion rendered by the Missouri Supreme Court in 1959. In that case the plaintiff sought to recover \$100,000.00 for personal services rendered the City of Springfield as a negotiator in the purchase of the property of the Springfield City Water Company, a public utility.

Plaintiff alleged, and his allegation in this respect was not denied, that on June 25, 1956, the city council of the City of Springfield, Missouri, duly passed and the mayor signed a resolution which read in part:

"Whereas, it is desirable that the City of Springfield, Missouri, be represented by a suitable person in negotiating the proposed purchase of the Water Works; Now Therefore, Be It Resolved by The Council of the City of Springfield, Missouri, as follows:

"That the Water Works Committee of the Council be and it is hereby authorized to employ a suitable person to represent the City in such negotiations and a reasonable compensation for services and expenses to be fixed by the Council upon the completion of his services."

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Thereafter, the mayor of the City of Springfield, a member of the Waterworks Committee, wrote to the plaintiff informing him that he had been selected to represent the city in its negotiations with the Springfield City Water Company. At this point we quote from the opinion (l.c. 778):

" * * * In one letter it was stated: 'The Water Works Committee of the Springfield City Council has, in accordance with the authority granted in a resolution adopted last night (a copy of which is enclosed), unanimously appointed you to represent the City in negotiations with the Springfield City Water Company for the purchase of the water works by the City.' In the other letter the then-Mayor stated, 'It is our understanding that the City will expect to pay you fair compensation for your services in the matter, the compensation to be agreed upon between you and the City Council when the matter is completed. If this is not your understanding of the agreement, please let me know at once. This is the understanding Mr. Wann had after his second conversation with you; that you could not fix a fee in advance, but that you would rely on the fairness of the Council in agreeing upon a fair and reasonable fee.' The letter closed with this statement: 'I am enclosing a formal notification of your appointment, also, a copy of the resolution.'

"On June 28, 1956, plaintiff replied by letter, in part, as follows: 'I wish to acknowledge your letter of June 26 stating that the Water Works Committee of the Springfield City Council had appointed me to represent the City of Springfield in negotiations with the Springfield City Water Company for the purchase of the water works by the city. I hereby advise you of my acceptance as negotiator on the basis and terms as set out in your letter of June 26 * *.'"

Thereafter, plaintiff entered upon his duties as negotiator and successfully negotiated and completed the work which he had

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contracted with the city to do. Thereafter, the plaintiff presented his claim to the city for services and the city denied any liability whatsoever because there was not compliance, from the standpoint of a written contract, with Section 432.070, supra.

At l.c. 780 of the Burger opinion the court, after quoting Section 432.070, supra, states:

"With reference to this statute the court in *Aurora Water Co. v. City of Aurora*, 129 Mo. 540, 578, 31 SW 946, 955, said: 'Touching the objection that the contract was not made in writing, in conformity with section 3157, Rev. St. 1889, it is enough to say that the ordinance having been passed as required by law, which ordinance set forth the terms of the contract, and that ordinance being approved by the requisite vote, and then accepted by the person or persons proposing to build the works, constituted a completed contract. * * * Under the rigid rule established by the statute of frauds, it was not necessary, in order to make a contract binding, that it should be all contained in one paper signed by the party to be charged; but the terms of the contract may be contained in one paper, and the signature may be found in some other paper, provided that such second paper properly refer to the terms of the containing paper. Fry, Spec. Perf. [3 Ed.], sec. 520. Numerous instances have occurred where letters have constituted the contract, the written evidence of and acceptance of it. *Ib.*, secs. 270, 529. It surely was never intended by the legislature that a rule of greater stringency should be applied in instances like the present, than in those just instanced.' And see *State ex rel. Kansas City Ins. Agents' Ass'n v. Kansas City*, 319 Mo. 386, 4 SW2d 427, 430(3).

"It appears, therefore, that the contract sued on in this case was in writing. The resolution in question was pleaded. The resolution is alleged to have been duly adopted by the City Council, approved by the Mayor and duly signed, and a copy was attached to the amended petition.

Honorable John A. Honssinger

Notification of appointment and acceptance thereof were alleged to have been in writing and copies of the signed letters were attached. The formal execution of the contract was sufficient. * * *

It would appear to us that there is a great deal of similarity between the fact situation in the instant case and between the Burger case and the case of Aurora Water Company v. City of Aurora, quoted in the Burger case. In the instant case, as we have pointed out, there was a definite offer to perform a service by the contractor to the county, and there was an acceptance by the county of such offer, which acceptance was evidenced by the entry set forth above in the county court records. We believe that this action by the contractor and the county was sufficiently similar to the actions taken in the Burger case and the City of Aurora case, in both of which it was held that a written contract was made, to constitute a contract "in writing" as that term is used in Section 432.070, supra.

CONCLUSION

It is the opinion of this department that a letter to a county court by an authorized officer of a construction company, offering to do certain work for the county for the actual cost of labor and materials plus ten per cent, and an entry made subsequent to the receipt of such letter by the county court accepting such offer, sufficiently constitute a written contract to comply with the requirement of Section 432.070, RSMo 1949, that such contracts "shall be in writing."

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:lc;ar

COUNTY OFFICERS: Section 137.117, VAMS, requires that the county
COUNTY RECORDER: recorder furnish a description of property conveyed
COUNTY ASSESSOR: in terms of sections or fractional parts of sections,
or by subdivisions, lots or parcels where subdivided
into such unit and plat is duly recorded. If description cannot be
furnished on the basis of these units then the recorder must furnish
the assessor with a description which will enable the assessor to
locate the property. The description furnished must contain the number
of acres transferred when it is given in the instrument, together with
the names of the grantor and grantee, the consideration paid and the
book and page where the deed is recorded.

February 2, 1960



Honorable C. J. Hulen, Jr.
Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Mr. Hulen:

As stated by our letter of September 15, 1959, the question posed by your recent inquiry requested that Section 137.117, VAMS, as amended, be analyzed to determine whether the county recorder must furnish the county assessor a complete description of all real estate transferred. Your original inquiry pertaining to Section 137.132, RSMo Cum. Supp., 1957, on the same subject, reads:

"Would you please advise me as to whether or not Subsection 3 of Section 137.132 of Revised Statutes of the State of Missouri, requires the Recorder of Deeds in counties of the 3rd class to furnish the Assessor of his county with a legal description of the real estate transferred, if such description is available to him, or if it requires the Recorder of Deeds to furnish the Assessor with the description on the instrument of transfer or if it merely requires the Recorder of Deeds to furnish the Assessor a brief description of the real estate transferred."

As you know, Section 137.132, supra, was revised and renumbered during the last legislative session and is now Section 137.117, VAMS, as amended, and reads:

"The circuit clerk and ex officio recorder of deeds of each county of the fourth class and of each county of the third class wherein the offices are combined, and the recorder of deeds of each county of the third class wherein the offices are separate, shall furnish the county

Honorable C. J. Hulén, Jr.

assessor of his county, or the township assessors in counties with township organization, on or before the fifteenth day of each month a true and complete list of all real estate transfers completed in the county or townships, in counties with township organization, during the preceding month. The list so furnished shall contain the following information relating to each transfer:

"(1) The names of the grantor and grantee:

"(2) The consideration paid:

"(3) A description of the real estate transferred by the smallest legal subdivisions, or by smaller parts, lots or parcels, if sections and the subdivisions thereof are subdivided into parts, lots or parcels as shown by plat duly recorded and if not so subdivided then by such description as will enable the assessor to find it, together with the number of acres transferred, and

"(4) The book and page number where each deed is recorded. Laws 1955, p. 834, §1, renumbered and amended Laws 1959, p __, H.B. No. 108, §1 (§137.132)."
(Emphasis ours)

More particularly we are concerned with subsection (3) of this section relating to the description of the property transferred, however, subsections (1) and (4) also have a bearing on our determination. Note that subsection(3) of this section makes two requirements in the alternative as to the description furnished, i.e., that a description be furnished of the smallest legal subdivision that such lands have been divided into or, if it has not been so subdivided, then a sufficient description must be furnished so that the assessor can find the land.

The first alternative under this subsection indicates that the recorder is required to furnish only a description of the smallest unit into which the land has been subdivided and as shown by a recorded plat. This would, of course, mean that where the description in the instrument transferring such real estate is described in terms of sections or fractional parts of sections, or by parts, lots or parcels, where a plat has been duly recorded, such description would constitute a description that must be used by the recorder in describing the property transferred.

Honorable C. J. Hulen, Jr.

If, on the other hand, property has not been so divided then the description given in the instrument need not be given in full, unless the assessor could not otherwise locate the property. The criteria of description, where land has not been so described or divided, then becomes such a description as will enable the assessor to locate the property.

Either type of description requires in addition, the number of acres conveyed, where the acres are a part of the description in the instrument, together with the names of the grantor and grantee, as required by subsection 1, of Section 137.117, VAMS, and the book and page where such instrument is recorded, as required by subsection 4 of Section 137.117, VAMS. This section also requires by subsection 2, that the consideration paid be furnished to the assessor.

Conclusion

Therefore, it is the conclusion of this office that by the terms of Section 137.117, VAMS, the county recorder is required to give the county assessor a description of property transferred in terms of sections, or fractional parts of sections, or by parts, lots or parcels where a plat has been duly recorded or if the property may not be so described, then the description need not be given in full, unless the assessor could not otherwise locate the property. Where either form of description is given, the number of acres must be furnished as a part of the description if the number of acres has been given in the instrument. In addition, Section 137.117, VAMS, also requires that the name of the grantor or grantee, the consideration paid, and the book and page where the instrument is recorded, be furnished by the recorder to the assessor.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Jerry B. Buxton.

Yours very truly,

John M. Dalton
Attorney General

JBB:rw

CHILD LABOR: A child who has passed his fourteenth birthday but who is under the age of sixteen years may be employed, except in those occupations enumerated in Section 294.040, during summer vacations when school is not in session, without securing a work certificate.

June 27, 1960



Honorable Frank Hume, Director
Division of Industrial Inspection
Department of Labor and Industrial
Relations
Jefferson City, Missouri

Dear Mr. Hume:

On June 16, 1960, you wrote to this department requesting an official opinion upon a matter which is set forth in a letter dated June 7, 1960, directed to you by William J. Delahunty, Assistant Director, Division of Industrial Inspection. The letter of Mr. Delahunty reads:

"Senate Bill No. 17, Laws of 1957 relating to child labor, became effective August 29. With the enactment of the new child labor laws by the 69th General Assembly, new work permits and other necessary forms are required for the proper administration of this Act. These laws make provision, under certain conditions, for the issuance of work permits for persons between the ages of 14 and 16 years.

"There has been a great deal of conversation pertaining to Section 294.024 of the revised statutes of the State of Missouri 1957.

"The chapter reads as follows - 294.024 - Employment of minors between fourteen and sixteen on work certificates, exceptions. A child who has passed his fourteenth birthday but is under sixteen years of age may be employed, permitted or suffered to work at any gainful occupation (other than those prohibited by section 294.040) except that he may not be employed, permitted or suffered to work during the regular school term unless he has been issued a work certificate under the provisions of sections 294.011 to 294.110.

Honorable Frank Hume

"We would like to have an opinion as to whether or not a minor should have a work permit issued to him during the summer vacations when school is not in session.

"Mr. Hume, we would appreciate it very much if you would get the Attorney General's opinion on this matter as to whether a work permit is compulsory while school is not in session."

In addition to Section 294.024 quoted by Mr. Delahunty above, we direct attention to Section 294.027, Laws 1957, page 525, which reads:

"Work certificates shall permit

(1) The employment of children between fourteen and sixteen years of age during nonschool hours during the school term; or

(2) The employment of children between fourteen and sixteen years of age who are excused from attendance at school by the provisions of chapter 164, RSMo."

As we read Section 294.024, it holds that a child who has passed his fourteenth birthday but who has not reached his sixteenth may be employed at any gainful occupation except those enumerated by Section 294.040. To this grant there is, however, attached the exception that he may not be so employed during the regular school term unless he has been issued a work certificate.

The following Section, 294.027, sets forth that a work certificate shall permit the employment of children between the above ages during nonschool hours during the school term or the employment of children between the stated ages who are excused from attendance at school.

From the above it would appear to us to be clear that the whole intent of the law was, not to prevent children between the ages of fourteen and under sixteen from working except in those occupations prohibited, but that such work should not interfere with their schooling.

We believe that a child within the age range noted above does not come within the compass of the requirement that a work permit must be obtained during summer vacation when school is not in session.

Honorable Frank Hume

CONCLUSION

It is the opinion of this department that a child who has passed his fourteenth birthday but who is under the age of sixteen years may be employed, except in those occupations enumerated in Section 294.040, during summer vacations when school is not in session, without securing a work certificate.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:ar

MUNICIPALITIES: When state aid is given a municipality to acquire a
AIRFIELDS: site, construct and place its memorial airfield in
OPERATION: operation under Section 305.230 RSMo 1949, said
DISPOSITION: municipality has no obligation to State of Missouri
to continue operation of airfield for any definite
period of time, but may dispose of same. Section
305.230 imposes no duty on municipality to reimburse
state for prior grant of aid out of proceeds of air-
field sale.

February 1, 1960



Honorable James D. Idol, Director
Missouri Division of Resources and
Development
Jefferson Building
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal
opinion, which request reads:

"The Memorial Airport Act, Section 305.230,
Revised Statutes of Missouri, 1949, was en-
acted to give state aid in the sum of \$10,000
matching funds to cities in the construction
of airfields. Due to changing conditions,
establishment of new airfields, or acceptance
by cities of abandoned military fields, some
cities are finding it to their advantage to
abandon airfields constructed through these
matching state aid funds.

"We are in need of an opinion from your office
on the following questions. Under the Memorial
Airport Act, does a municipality have any obliga-
tion to the State of Missouri to continue opera-
tion of the airport for any definite period of
time? Does the municipality have the right to
dispose of the property? If so, must the State
be reimbursed for the money advanced?"

Section 305.230, RSMo 1949, authorizes cities, towns and counties
to purchase sites, construct and operate memorial airfields in honor
of the veterans of the war against Germany, Japan and their allies.
Said section reads as follows:

"In appreciation of the services of our gallant
armed forces and to perpetuate the memory of
their heroic achievements in the war against
Germany, Japan and their allies and to promote

Honorable James D. Idol

the advancement of aviation in the name of those who gave their lives as members of our gallant armed forces in the war against the aforesaid enemies, cities, towns and counties are hereby authorized to purchase sites and construct and operate airfields in such counties or near such cities and towns and to receive free technical advice from the division of resources and development; provided further, that when any city, town or county in Missouri shall certify to the governor that it has appropriated a specific sum for the aforesaid purpose and is ready to proceed with the purchase or construction of such airfields a like sum not exceeding ten thousand dollars shall be allotted to said city, town or county from the appropriation herein made for such purpose but said sum shall be released to such city, town or county only after the division of resources and development has certified to the governor that in their judgment the airfield in question is desirable and in the interest of the development of aviation and that the funds proposed are adequate to complete the project; and provided further, that cities, towns or counties are hereby authorized to receive federal grants in addition to all other grants or funds made available for such purpose under this section."

From the factual situation involving the present request for a legal opinion, it is assumed that a municipality which has substantially complied with the provisions of Section 305.230, supra, has been granted state aid in an amount sufficient to enable it to acquire real estate upon which to construct an airfield and that the site has been acquired, the airfield constructed thereon, and it has finally been placed in operation by the municipality. That after the airfield has been in operation for some undisclosed period of time the municipality desires to dispose of its airfield. The first inquiry regarding such factual situation reads:

"Under the Memorial Airport Act, does a municipality have any obligation to the State of Missouri to continue operation of the airport for any definite period of time?"

Our belief that no particular period of operation is required before the airfield may be disposed of is based upon the fact that the

Honorable James D. Idol

section contains no provisions that the airfield shall be operated for any definite period of time before it can be abandoned or otherwise disposed of, or that it never can be abandoned or disposed of under any circumstances. Since the lawmakers have not inserted any such provisions in the statute, we can only assume they elected not to do so and, therefore, we cannot read provisions into it which are not there.

A municipality which has received a state grant of aid is not required for that reason to operate its airfield for any particular length of time but rather the grant is an outright gift with no conditions or strings attached.

Therefore, in view of the foregoing, and in answer to the first inquiry, it is our thought that under the provisions of Section 305.230, supra, a municipality which has received a state grant of aid for the purchase of a site, construction and operation of a memorial airfield on said site, has no obligation to the State of Missouri to continue operation of the airfield for any definite period of time.

The second inquiry asks if the municipality has the right to dispose of the (airfield) property. In the case of Behnke v. City of Moberly, 243 S.W. 2d 549, it was held by the Kansas City Court of Appeals that the ownership and maintenance of an airport by a city was a municipal or proprietary function. At l.c. 553, the court said:

"[4] It was also stated in Annotation, 138 A.L.R. 126: 'The weight of authority supports the view that in the absence of a statute indicating an intention to exempt municipalities from liability in such cases, the maintenance or operation of an airport by a municipal corporation is the exercise of a proprietary function, and that the municipality may be liable for torts in connection therewith.' See, also, Annotation, 83 A.L.R. 333, 351. Under the record before us and in the absence of statute to the contrary, we conclude that the ownership and maintenance of the airport by the City of Moberly was a municipal or proprietary function and not a governmental one."

It is held in Section 962 C.J.S Vol. 63, page 510 as follows:

"* * *On the other hand, a municipal corporation may, as a general rule, alienate without legislative sanction property which it holds in its private or proprietary capacity and property acquired and held

Honorable James D. Idol

for general municipal purposes is subject to its discretionary power of use and disposal if not needed for a municipal purpose. * * * *

In view of the fact a municipality owns and operates its memorial airfield in its proprietary capacity, it is our thought that it has the legal right to dispose of its airfield property.

In our discussion of the first inquiry it was pointed out that state aid given a municipality for the purpose of enabling the municipality to acquire a site, construct, complete and operate its memorial airfield thereon, under provisions of Section 305.230, supra, was an outright grant of aid with no conditions or strings attached, consequently, in the absence of statutory provisions to the contrary, when a municipality sells its memorial airfield, the municipality owes no duty to the State of Missouri to reimburse it for a prior grant of aid out of the proceeds of such sale.

CONCLUSION

Therefore, it is the opinion of this department that when the State of Missouri makes a grant of aid for the purposes of enabling a municipality to acquire a site, construct and place its memorial airfield in operation, under provisions of Section 305.230 RSMo 1949, said municipality has no obligation to the State of Missouri to continue operation of such airfield for any definite period of time, but such municipality may dispose of its memorial airfield property. In the event of a sale of the airfield property, Section 305.230, RSMo 1949, does not impose the duty upon the municipality to reimburse the State of Missouri for a prior grant of aid from the proceeds of such sale.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Paul N. Chitwood.

Yours very truly,

John M. Dalton
Attorney General

PMG:cm

STATE PARK BOARD:

BONDS:

State Park Board is not authorized to enter into privately negotiated option agreement for sale of revenue bonds.

April 7, 1960



Mr. Joseph Jaeger, Jr.
Director of Parks
Missouri State Park Board
Jefferson City, Missouri

Dear Mr. Jaeger:

This refers to your letter of March 25, 1960, requesting an opinion from this office relating to the sale of revenue bonds of the Missouri State Park Board, which letter reads as follows:

"Reference is made to paragraph 4, section 253.260, Mo. R.S. 1957, pertaining to the sale of revenue bonds. Following is said paragraph:

"4. The bonds, when issued, shall be sold at public sale for the best price obtainable after giving such reasonable notice of the sale as the state park board may determine except that no bonds shall be sold for less than ninety-five per cent of their par value, and accrued interest.

"On October 5, 1959, the Missouri State Park Board called for a public sale for revenue bonds in the principal amount of \$250,000 for Montauk State Park, Dent County. At that time there were no bidders for this revenue bond issue. I should now like to request your legal opinion as to whether or not the

Mr. Joseph Jaeger, Jr.

Missouri State Park Board can sell this particular revenue bond issue on 'option' to an interested party."

Paragraph 4, Section 253.260, RSMo Cumulative Supplement 1957, quoted in your letter, requires that revenue bonds issued by the Missouri State Park Board "shall be sold at public sale." The pertinent statutory provisions contain no exception to this requirement except that paragraph 5 of the same section provides that such bonds may be sold to the United States or to any of its agencies or instrumentalities without public sale.

We assume that when you inquire whether the Missouri State Park Board may sell the revenue bond issue mentioned in your letter to an interested party on option, you have reference to the authority of the board to enter into a privately negotiated agreement with some individual under which such individual would have the right to purchase the bonds at a stated price within a specified period and the board would be required to sell the bonds to him if he should elect to exercise such option.

The sale of the bonds pursuant to such an option agreement would not be a public sale of the bonds and, in view of the statutory requirement that the bonds shall be sold at public sale, it is our opinion that the Missouri State Park Board has no authority to enter into such an agreement.

CONCLUSION

It is the opinion of this office that the Missouri State Park Board has no authority to enter into a privately negotiated option agreement under which an individual would have the right to purchase revenue bonds issued by the board at a stated price and within a specified period and the board would be required to sell the bonds if such individual elected to exercise his option.

The foregoing opinion, which I hereby approve, was

Mr. Joseph Jaeger, Jr.

prepared by my assistant, John C. Baumann.

Very truly yours,

John M. Dalton
Attorney General

JCB:lc

CITIES:
POLICE BOARDS:
ST. LOUIS BOARD OF
POLICE COMMISSIONERS:

St. Louis Board of Police Commissioners may discontinue the use of a station house if it deems it is no longer needed in the administration of police matters in the particular police district.

April 27, 1960



Honorable John W. Joynt
Member, Missouri Senate
Second District
1221 Locust Street
St. Louis 3, Missouri

Dear Mr. Joynt:

This is in response to your request of March 10, 1960, for an opinion of this office, which request reads as follows:

"Very recently an announcement was made by the St. Louis Police Department to the effect that police stations in certain Police Districts of the City of St. Louis would be closed and become inoperative. One of such police stations is in my Senatorial District and I have had a flood of telephone calls concerning the subject and indicating great alarm on the part of those individuals making the inquiries, as to the possibility of a failure and breakdown in police protection.

"Section 84.190 of Vernon's Annotated Missouri Statutes, Paragraph 1 thereof, indicates the duties and responsibilities of the Board of Police Commissioners with respect to the Board's authority in such cases as set out above.

"It would be appreciated if you would prepare for me your official opinion as to whether or not the St. Louis Police Board is authorized by law to discontinue the operation and maintenance of police stations in any or all of the several

Honorable John W. Joynt

Police Districts of our city. It may be that the Board has already obtained from you and is acting upon and under the authority of such an opinion. If so, I should like to have a copy of your opinion as furnished the St. Louis Police Board."

It is to be noted that Sections 84.010 to 84.304, V.A.M.S., inclusive, which relate to the St. Louis Police Department, give the Board of Police Commissioners broad discretionary powers. For example, Section 84.210, supra, provides that the Board shall annually prepare and submit an estimate of the sum of money needed to enable them to discharge their duties and meet the expenses of the Police Department, and the Board of Aldermen is required to appropriate the amount submitted out of the revenue of the city after withholding enough from the revenue to pay certain preferential items, such as interest on the city's indebtedness. In *State v. Gunn*, 326 SW2d 314, 327(14), the Supreme Court of Missouri stated:

"While it has been held (*State ex rel. Beach v. Beach*, Banc, 325 Mo. 175, 28 SW2d 105) that the city has no power to question the reasonableness of the Police Board estimate, we hold that the courts may review it in a proper proceeding, solely to determine if its discretion has been arbitrarily and unreasonably exercised. * * *"

Section 84.190, RSMo 1949, provides that the Board of Police Commissioners "shall divide the said cities into twelve police districts, and provide in each of them, if necessary, a station house or houses, with all things and equipment required for the same, and all such other accommodations as may be required for the use of the police." (Emphasis ours.)

Section 84.190, supra, is silent with respect to the closing of a station house, and we are unable to locate any other statute which relates to this subject. Likewise, we do not find any case wherein this question has been considered by the courts.

In the absence of a statute or case decisions on the subject, the answer to your inquiry depends upon the construction placed upon the use of the words "provide" and "if necessary" in Section 84.190, supra.

Honorable John W. Joynt

The word "provide" is defined in Black's Law Dictionary, Fourth Edition, as: "To make, procure, or furnish for future use; to supply."

There is nothing in the above definition to indicate that once a station house has been provided by the Board that it must continue in use for all times.

The Dictionary defines the word "if" as "a condition." The word "necessary" is defined in the Dictionary as "Essential to a desirable or projected end or condition."

When the definition of the words "if necessary," set out above, is read in connection with Section 84.190, supra, the effect of the words is to clothe the Board with discretionary authority with respect to the need of a station house or houses in a particular district. Trustees of New London Township vs. Miner, et al., 26 Ohio St. 452, 457. We believe that in the absence of legislation to the contrary, the discretion to discontinue the use of a station house or houses is incident to the discretion to provide them. Ware vs. United States, 4 Wall. 617, 632. Therefore, as the Legislature has remained silent on the subject of closing station houses, we are of the opinion that the St. Louis Board of Police Commissioners may, in the exercise of its discretion, discontinue the use of a station house if and when the Board deems it is no longer needed in the administration of police matters in the particular police district.

CONCLUSION

Therefore, it is the opinion of this department that the St. Louis Board of Police Commissioners may discontinue the use of a station house if it deems that it is no longer needed in the administration of police affairs in the particular police district.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Calvin K. Hamilton.

Yours very truly,

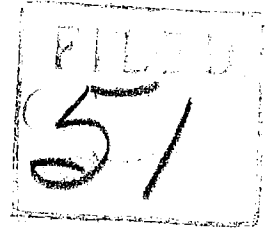
JOHN M. DALTON
Attorney General

CKH/mlw

CIRCUIT CLERKS: 1. Duty of judges to return ballots and poll books to
ELECTIONS: county clerk. 2. Duties of sheriffs at election.
3. Absentee ballots may be sent by certified mail.
4. Time off for voting applies although employee lives in county other
than where he is employed. 5. Allowance to election judges for
returning poll books and ballots to clerk and for services as election
judge may not exceed maximum fixed by §111.350. 6. Circuit clerk who
"earns" fees on change of venue receives such fees.

November 3, 1960

Honorable Alden S. Lance
Prosecuting Attorney
Andrew County
Savannah, Missouri



Dear Mr. Lance:

This is in response to your letter in which you ask several questions with respect to the election laws. We will quote each of your questions and answer them separately. Your first question is:

"1. Section 111.480 RSMo 1949, As Amended, provides that 'the Clerk of the County Court shall cause to be delivered to the judges of election of each election district which is within the County in which the election is to be held, the number of ballots printed for such district, said delivery to be made by the Sheriff of the County or his Deputy, who shall be allowed a reasonable compensation for his services to be provided for by the County Court.' Section 111.690, RSMo 1949, As Amended, states 'at the close of each election the judges shall transmit one of the poll books by one of their clerks or by registered mail at their discretion, to the Clerk of the County Court in the County in which the election was held, within two days thereafter; if the poll books are not returned within the time provided, the Clerk shall have the power to either send the Sheriff or a messenger for said books;'. Section 111.700 RSMo 1949, As Amended, provides that the judges or clerks shall return the ballots to the County Clerk. Section 111.690 also provides for the payment of a messenger if such be necessary to return the poll books. In our County, which is a county of the third class, there seems to arise a rather violent dispute each time we have an

Honorable Alden S. Lance

election over who is going to return the ballots to the County Clerk. In some instances the Deputy Sheriff, who has been present at the polling place during the day to preserve the peace, has returned ballots when there seemed to be a deadlock between the Republicans and Democrats who were equally divided, as to who was going to return the ballots. What is your opinion as to the proper method to select the person designed to return the ballots? Would the County Clerk or the Sheriff have the authority to designate that the Deputy Sheriff should act as the messenger and return the ballots to the County Clerk?"

We set forth Section 111.630, V.A.M.S., in part, and Section 111.690, V.A.M.S., as follows:

Section 111.630:

"The judge to whom any ticket shall be delivered shall, upon receipt thereof, pronounce in an audible voice the name of the voter; and if the judges shall be satisfied that the person offering to vote is a legal voter, his ticket, with the number covered as directed in section 111.620, shall be placed in the ballot box without inspecting the names written or printed thereon, or permitting any other person or persons to do so; and the clerks of election shall enter the names of voters and the number of the ballots, in the order in which they were received, in the poll books, in conformity with the form printed in section 111.510; and no ballot not so numbered shall be deposited in the ballot box and counted; and the ballots, after being counted, shall be sealed up in a package and delivered to the clerk of the county court or corresponding officer in any city not within a county, who shall deposit them in his office, where they shall be safely preserved for twelve months; * * * "

Section 111.690:

Honorable Alden S. Lance

"At the close of each election the judges shall transmit one of the poll books by one of their clerks or by registered mail at their discretion to the clerk of the county court in the county in which the election was held within two days thereafter; if the poll books are not returned in the time provided the clerk shall have the power to either send the sheriff or a messenger for said books; the other poll book shall be retained in the possession of the judges of election open to the inspection of all persons; provided, that if such poll books be transmitted by messenger, the county court shall pay such messenger for such service at the rate of ten cents per mile for each mile necessarily traveled, going and returning."

You will note that Section 111.630, supra, provides that the ballots, after being counted, shall be sealed up in a package and delivered to the county clerk, and Section 111.690, supra, provides that the election judges shall transmit one of the poll books to the county clerk by one of their clerks or by registered mail. It would seem apparent that the law places the responsibility upon the election judges to see that the ballots and the poll books are delivered to the county clerk, and there is no provision for reconciling disputes between the judges with respect to who shall deliver the ballots and poll books.

As a practical matter it would seem that if no agreement can be reached under which some one person is to perform this function, the only apparent answer would be for two or more persons to perform this function. Therefore, we believe that it is the responsibility of the election judges to see that both the poll book and the ballots are returned to the county clerk.

Your second question is:

"2. Would the Sheriff's Deputy in a Class III County such as Andrew County have any duties other than delivering the ballots to one of the judges as provided by Section 111.480, RSMo 1949, As Amended, and preserve the peace under the direction of the judges as provided by Section 111.050, RSMo 1949, As Amended, at the election place during the day of the election?"

Honorable Alden S. Lance

In answer to your second question we would simply state that the sheriff's deputy in a class three county, such as Andrew County, does have duties other than delivering the ballots to one of the judges, and other than preserving the peace under the direction of the judges, at the election place during the day of election. There are certain other duties that the sheriff or his deputy are to perform prior to the election, such as delivery of the poll books to the judges and delivery of the ballot boxes, etc.

Your third question is:

"3. Section 112.030, RSMo 1949, As Amended, provides that 'the official charged with the duties of furnishing absentee ballots shall send by registered mail, postage prepaid, or deliver in person, an official ballot.' Would mailing the absentee ballots by certified mail qualify under the laws pertaining to delivery of absentee ballots?"

Section 1.025, V.A.M.S., reads as follows:

"As used in the statute laws of this state, 'registered mail', when used with reference to the sending of notice or any article having no intrinsic value, includes certified mail as defined and certified under regulations of the United States Post Office Department."

This would make apparent that the answer to your third question is that the mailing of absentee ballots by certified mail is proper.

Your fourth question is:

"One of the reasons given for the issuance of an absentee ballot is absence from the County on the day of election. In Andrew County we have many voters who are employed in St. Joseph, which lies in Buchanan County. Many of these workers leave Andrew County before the polls open and they return to the County after the polls are closed. Would their employer be required to allow them sufficient time to return to Andrew County to vote in person where it would probably take two hours to do so, or would these persons be qualified to vote absentee ballots?"

Honorable Alden S. Lance

In considering your fourth question, we think it only necessary to set forth paragraph 1 of Section 129.060, V.A.M.S., which is as follows:

"1. Any person entitled to vote at any election held within this state, or any primary election held in preparation for such election, shall, on the day of such election be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of three hours between the time of opening and the time of closing the polls for the purpose of voting; and any absence for such purpose shall not be sufficient reason for the discharge of or the threat to discharge any such person from such services or employment; and such employee, if he votes, shall not, because of so absenting himself, be liable to any penalty, nor shall any deduction be made on account of such absence from his usual salary or wages; provided, however, that request shall be made for such leave of absence prior to the day of election, and provided further, that this section shall not apply to a voter on the day of election if there be three successive hours, while the polls are open, in which he is not in the service of his employer. The employer may specify any three hours between the time of opening and the time of closing the polls during which such employee may absent himself as aforesaid."

You will see from the above section that any person entitled to vote at an election held within this state is entitled to be absent from any employment for a period of three hours between the time of opening and the time of closing the polls for the purpose of voting. The primary condition to his absence would appear to be that he shall request such leave of absence prior to the day of election; and you will note further that he is not entitled to this three-hour absence if, on the day of election, there be three successive hours, while the polls are open, during which he is not in the service of his employer. Therefore, the answer to your question is that the employer is required to allow employees sufficient time to return to vote in Andrew County, within the limitations set forth in Section 129.060, supra. The fact that

Honorable Alden S. Lance

the employment is in another county would not affect the employee's right in this regard.

Your fifth question is:

"5. Section 111.350, RSMo 1949, As Amended, provides that judges are to receive 'not to exceed \$8 per day except in townships or precincts where the vote at any election is in excess of 600 votes, the County Courts may at their option, pay at the rate of \$.50 per hundred for each additional 100 votes or major fraction thereof, not to exceed \$10 per any election to be paid out of the County Treasury.'

"In the event that your opinion on questions No. 1 indicates that a judge may or shall return the ballots to the County Clerk, would such judge be allowed, in addition to the \$8 per day, mileage at the rate of 5¢ per mile, or at the rate of 10¢ per mile as provided in Section 111.690, RSMo 1949, As Amended? You may assume that all of the precincts in Andrew County have less than 600 voters."

In answer to your fifth question, we are enclosing a copy of an opinion written to Marion Robertson, Marshall, Missouri, on March 25, 1943. You will see from this enclosed opinion that the county court may make such allowance as is reasonable for payment of election clerks, provided that this compensation does not exceed statutory limitations. It is our belief that this opinion correctly states the law and therefore the law restricts the total allowance which the county court could grant to an election judge for returning the ballots to the county clerk so that such allowance, together with the compensation allowed for his services, may not exceed the maximum fixed by §111.350, V.A.M.S. However, it will be seen from Section 111.690, supra, that if the poll books are transmitted by a messenger sent by the county clerk, this messenger may be paid by the county court for his service at the rate of ten cents per mile for each mile necessarily traveled, going and returning.

Your sixth question is:

"6. In a recent criminal case tried in Andrew County the case was tried prior to the last election and the defendant was convicted of a felony. The case was then

Honorable Alden S. Lance

appealed to the State Supreme Court and the decision of the Circuit Court was affirmed by the Supreme Court. Between the time of conviction in the Circuit Court of Andrew County and the affirmation of such conviction in the Supreme Court of Missouri, a regular general election was held and a new Circuit Clerk was elected. At the time the case was appealed to the Supreme Court the 'old' Clerk had accumulated fees of \$12.35 due to the Circuit Clerk. Now that the case has been affirmed and finally disposed of during the tenure of a newly elected Circuit Clerk, who is entitled to the \$12.35 Circuit Clerk fees, the lady who was Circuit Clerk at the time the fees were incurred during the trial in Andrew County, or the person who was Circuit Clerk at the time the case was finally closed and disposed of by the Mandate of the Supreme Court of the State of Missouri?"

In answer to your final inquiry, we would point out that, by §483.660, V.A.M.S., the circuit clerk in your county is required to pay into the county treasury all fees collected by him, "except fees collected in cases of change of venue from other counties." Section 483.335, V.A.M.S., permits the circuit clerk in Andrew County to retain fees earned by him in cases of change of venue from other counties. In view of these provisions, your question has significance only in cases of change of venue.

If the case about which you inquire is one in which the clerk would be entitled to retain the fees because the case was in Andrew County on change of venue, then the person who had "earned" such fees would be entitled to them, although she was not the clerk at the time that the fees were finally paid. This conclusion is based on the case of Thornton v. Thomas, 2 Mo. App. 595, wherein the court held that:

"1. The clerk of the Circuit Court, to whom fees are taxed in any case, is the only person entitled by law to receive them from the party chargeable, or from the sheriff, who has collected them on fee-bill or execution.

"2. When fees are collected, they will be held by the clerk, to his own use, or paid into the county treasury, according

Honorable Alden S. Lance

to the determination of the inquiry whether he has retained to his own use from other fees, earned in the same year, the maximum sum allowed him by law for any one year.

"3. The incumbent clerk has no right to fees earned by, or taxed to, his predecessor; they belong either to the latter or to the county, and the incumbent is not a trustee for the county, and has no power to administer this fund."

CONCLUSION

It is the opinion of this office that:

- (1) It is the responsibility of the election judges to see that the poll book and the ballots are returned to the county clerk.
- (2) The sheriff's deputy in a class three county does have duties other than delivering the ballots to one of the judges and other than preserving the peace under the direction of the judges, at the election place during the day of election.
- (3) The mailing of absentee ballots by certified mail by the county clerk is proper.
- (4) Any person entitled to vote at an election held within this state is entitled to be absent from any employment for a period of three hours between the time of opening and the time of closing the polls for the purpose of voting, consistent with the qualifications set forth in Section 129.060, V.A.M.S.
- (5) The total allowance which a county court may grant to an election judge for returning the ballots to the county clerk and for his services as such judge may not exceed the amount fixed by Section 111.350, V.A.M.S. However, a messenger sent by the county clerk who transmits the poll books to the county clerk may be paid for his services by the county court at the rate of ten cents per mile for each mile necessarily traveled going and returning.
- (6) When fees may be retained by circuit clerk in change of venue cases, the clerk who earned such fees is entitled to them, whether or not in office at the time of their actual payment.

Honorable Alden S. Lance

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James B. Slusher.

Very truly yours,

JOHN M. DALTON
Attorney General

JBS/mlw
Enclosure

INSURANCE: Articles of Incorporation of Old
Security Casualty Insurance Company.

March 24, 1960



Mr. Jack L. Clay
Deputy Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Pursuant to your request of March 23, 1960, an examination has been made of an executed copy of Declaration of Intention by original incorporators, together with proof of publication of the same, to form an insurance company to be known as Old Security Casualty Insurance Company.

It is the opinion of this office that the documents referred to in the preceding paragraph are in conformity with Sections 379.010 to 379.160, RSMo 1949, and not inconsistent with the Constitution and Laws of this State and of the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:vlw

INSURANCE: Articles of Incorporation of National Benefit
Life Insurance Company.

April 22, 1960



Honorable C. Lawrence Leggett
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of April 20th with which you submitted to this office an executed copy of declaration of intention of original incorporators of the proposed National Benefit Life Insurance Company, which declaration of intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1949. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070, RSMo 1949.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1949, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1949, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Very truly yours,

John M. Dalton
Attorney General

JLO'M:vlw

INSURANCE: Amended Articles of Incorporation of
Missouri Fidelity Life Insurance Company.

June 15, 1960



Honorable C. Lawrence Leggett
Superintendent of the
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

This opinion is rendered in reply to your inquiry of June 7, 1960, which was accompanied by an executed copy of amended Articles of Agreement of Missouri Fidelity Life Insurance Company, together with executed copies of proceedings of directors and stockholders of such company, by which actions the Missouri Fidelity Life Insurance Company, a stipulated premium plan life insurance company operating under Chapter 377 RSMo 1949, has by a majority vote of its directors or trustees elected to accept the provisions of Missouri's regular life law found at Sections 376.010 to 376.670 RSMo 1949.

An examination of the documents referred to in the preceding paragraph has been made as required by Sections 377.450 and 376.070 RSMo 1949. It is the opinion of this office that said documents are legally sufficient as to form, are in accord with the provisions of Chapter 376 RSMo 1949, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:ml

INSURANCE: Articles of Incorporation of Modern Security Life Insurance Company.

June 22, 1960



Honorable C. Lawrence Leggett
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of June 22 with which you submitted to this office an executed copy of declaration of intention of original incorporators of the proposed Modern Security Life Insurance Company, which declaration of intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1949. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070, RSMo 1949.

In examining the documents referred to in the preceding paragraph we take notice of the following:

- (a) The word "liability" found in line six of Article Four of the Articles of Incorporation should read "disability."
- (b) The acknowledgments of Richard J. Lynch and Ernest C. Wood to the Articles of Incorporation ante-date the signing of the Articles of Incorporation by one day.

The irregularities referred to above will not cause the Articles of Incorporation to be legally insufficient.

With the noted exceptions, an examination of the documents referred to above as required by Section 376.070, RSMo 1949, discloses that the same are in compliance with the applicable provisions of Chapter 376 RSMo 1949, and not inconsistent with the constitution and laws of this State and the United States.

Hon. C. Lawrence Leggett -2-

June 22, 1960

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Very truly yours,

John M. Dalton
Attorney General

JLO'M:ga

INSURANCE: Combination policies filed under Section 379.017, V.A.M.S., should be disapproved for filing when the filing company's own public rating record discloses that the rate of premium applicable to commercial "fire and allied lines" risks (and forming only a component part of the ultimate indivisible premium rate authorized for the combination policy) differs from the commercial "fire and allied lines" risk rate published for the filing company by the Missouri Inspection Bureau.

August 16, 1960

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri



Dear Mr. Leggett:

This opinion is in answer to your inquiry reading as follows:

"A certain foreign stock insurance company licensed in this state to write all the lines of insurance other than life has submitted for filing two multiple peril policies, both of which include, among other coverages, the perils of fire and allied lines. The said company has authorized an actuarial bureau to maintain its public rating record for fire, lightning, hail and windstorm on all classes of property under the Fire Rating Act, except dwelling. The said company maintains its own public rating record on the dwelling class. The policies in question do not fall within the dwelling class.

"As to the perils of fire and allied lines, the policies provide a rate different from the rate forming a part of the public rating record maintained by the company's authorized filing agent.

"May I lawfully approve such policies without requiring the said company to withdraw its membership from the actuarial bureau for this class?"

Honorable C. Lawrence Leggett

In this instance we are dealing with a multiple line fire and casualty insurer authorized to write all three classes of insurance enumerated in Section 379.010, RSMo 1949. The two multiple peril policy forms referred to above have been submitted to you for approval pursuant to the directive found in Section 379.017, V.A.M.S., as supplemented, and reading as follows:

"1. Every insurance company licensed to do business in this state and authorized to make insurance on all three classes of insurance enumerated in section 379.-010, RSMo, shall have authority to combine in single policies of insurance the perils of fire and allied lines with any one or more perils of casualty insurance which such company is authorized to make, and may charge therefor one indivisible premium or rate which may differ from the aggregate premium or rate applicable to separate policies covering the same property and risk or risks, and the difference in rates or premiums shall not be deemed to be unfairly discriminatory under the provisions of chapters 375 and 379, RSMo: provided, however, that any company issuing any policy combining coverages including protection against the peril of fire shall not discriminate unfairly between risks of essentially the same hazards and having substantially the same degree of protection.

"2. No company shall issue such a policy combining the perils of fire and allied lines with any one or more perils of casualty insurance until after it has submitted each combination of coverages to the division of insurance for the superintendent's approval or disapproval, and for establishing the public rating record to be maintained by each such company or insurer, or as may be similarly provided for, established and maintained by an actuarial bureau, and all combination of coverages approved by the

Honorable C. Lawrence Leggett

superintendent shall be regulated by the provisions of sections 379.315 to 379.415, RSMo, which are not inconsistent with the authority herein granted. Laws 1959, H.B. No. 249, §§ 1, 2."

The language appearing on the face of Section 379.017, supra, discloses that the principal objective of the statute is to authorize issuance of an insurance policy combining the perils of fire and allied lines with any one or more perils of casualty insurance with such policy calling for an indivisible premium which may differ from the aggregate premium applicable to separate policies covering the same property and risk or risks. The statute, Section 379.017, supra, has an important proviso directed to the power to issue the combination policy and we quote the proviso as follows:

"* * *: provided, however, that any company issuing any policy combining coverages including protection against the peril of fire shall not discriminate unfairly between risks of essentially the same hazards and having substantially the same degree of protection."

Section 379.017, supra, directs that its application is to be made in the light of Missouri's Fire Rating Act, by employing the following language:

"* * * and all combination of coverages approved by the superintendent shall be regulated by the provisions of sections 379.315 to 379.415, RSMo, which are not inconsistent with the authority herein granted."

We turn now to the direct question posed in the request for this opinion, reading as follows:

"May I lawfully approve such policies without requiring the said company to withdraw its membership from the actuarial bureau for this class?"

Honorable C. Lawrence Leggett

In the paragraph immediately preceding that in which you posed the foregoing question you have indicated a reason why you should condition your approval of the policies in question on the company's withdrawal of its membership from the actuarial bureau, and you have spoken as follows:

"As to the perils of fire and allied lines, the policies provide a different rate from the rate forming a part of the public rating record maintained by the company's authorized filing agent."

In your question you have referred to the fact that the company in question now has membership in the actuarial bureau for this "class." It is conceded that the actuarial bureau referred to is the Missouri Inspection Bureau, and that the word "class" refers to "mercantile" class of risks, one of the three major classifications of risks to which "fire and allied lines" insurance coverage is directed--the remaining two classes being "farm", and "dwelling" classes. Your inquiry discloses that the company in question maintains its own public rating record on the "dwelling" class.

The basic reason why the company in question is now maintaining a partial membership in the Missouri Inspection Bureau is to effect compliance with Missouri's Fire Rating Act found at Sections 379.315 to 379.415, RSMo 1949, as amended. This partial membership apparently has the approbation of the Missouri Inspection Bureau which serves as agent for the company in question in maintaining the company's public fire rating record touching its "mercantile" class of risks. Now the company in question, in the light of the provisions of Section 379.017, supra, proposes to maintain its own public rating record for its "mercantile" class in connection with the combination policies authorized by Section 379.017, supra.

In this type of situation your letter of inquiry discloses that you have determined that since the rate of premium to be applied to the "perils of fire and allied lines", when written in combination with any one or more casualty risk coverages, as authorized by Section 379.017, supra, is different from the rate for "fire and allied lines" when written separate and apart from the combination policy, a deviation from the public rating record maintained by the company in question has occurred, and that two different public rating records would result in relation to "fire and allied lines coverage."

Honorable C. Lawrence Leggett

The rates now published by the Missouri Inspection Bureau for the company in question on its "mercantile" class are rates applicable only to "fire and allied lines" coverage. The new type of risk coverage authorized by Section 379.017, supra, is a combination of "fire and allied lines" risk coverage and "casualty risk" coverage. The language of the statute authorizing this comprehensive coverage does not indicate in any manner that the coverage is to be limited to classes of property described as "farm", "dwelling", or "commercial." It is for this new, comprehensive risk coverage that the company in question proposes to establish its own public rating record as required by the following language from Section 379.017, supra:

"* * * and all combinations of coverages approved by the superintendent shall be regulated by the provisions of sections 379.315 to 379.415, RSMo, which are not inconsistent with the authority herein granted."

The Missouri Inspection Bureau is a fire rating bureau, or organization, as distinguished from a casualty rating bureau. In this opinion we are not concerned as to whether the Missouri Inspection Bureau is in a position to publish a public rating record on behalf of any of its company membership touching the combination policy authorized by Section 379.017, supra. Companies writing "fire and allied lines" are granted authority to maintain their own rating record by the following language from Section 379.320, RSMo 1949:

"For this purpose each company or other insurer shall be permitted to maintain its own public rating record or to use a public rating record maintained by an actuarial bureau; provided, such record shows the true and correct rate charged by such company or insurer; and provided further, that no company or other insurer may directly or indirectly by any agreement, contract, understanding or otherwise agree with any other company, insurer, or actuarial bureau to continue to use the rating record of any actuarial bureau or to refrain from maintaining its own rating record, or to maintain the rates fixed by such actuarial bureau."

It is necessary to disclose the "purpose" of a public rating record mentioned in the statute just quoted, above. Such "purpose"

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is shown by the following language from Section 379.315, RSMo 1949, as amended:

"1. Every fire insurance company or other insurer authorized to effect insurance against the risk of loss by fire, lightning, hail or windstorm shall maintain a public rating record from which the rate of premium applicable to each risk in this state to be written by such company or other insurer may be ascertained in advance of the making of insurance thereon.

"2. Such rating record shall include, insofar as applicable, general basis schedule embodying basis rates, charges, terms, conditions, permits and standards, and such other data necessary to the computation or promulgation of equitable rates and rules of practice.

"3. Such records shall also show the forms and endorsements upon which each rate is predicated, and shall further show the changes of rate to be made on account of each and every change of form or endorsement.

"4. Such rating record shall be open to the inspection of the entire public and shall be maintained in such a form that the property owner can readily ascertain the rate charged on any class of property and the makeup of such rate.

"5. Every fire insurance company or other insurer authorized to effect insurance against the risk of loss by fire, lightning, hail or windstorm shall upon request furnish to the holder thereof a written or printed analysis of the rate of premium charged for such policy, showing the items of charge and credit which determine the rate."

In quoting Section 379.320, RSMo., supra, we have shown that a company may maintain its own public rating record for the purpose of rating "fire and allied lines" risks, and by quoting Section 379.315, RSMo 1949, as amended, supra, we have shown that one of

Honorable C. Lawrence Leggett

the purposes for maintaining such public rating record is to enable us to determine from such public rating record "the rate of premium applicable to each risk in this state." Obviously the word "risk" refers to a "fire and allied lines" coverage as distinguished from a casualty risk which is not subject to the Fire Rating Act. In this connection we do find a prohibition in the Fire Rating Act against a company or insurer being a member of more than one rating bureau for the purpose of rating the same risks, such prohibition being found in the following language from Section 379.325, RSMo 1949:

"1. All rating and actuarial bureaus which consist of two or more members shall be open for membership to all authorized companies and insurers applying therefore, but no company or insurer shall be permitted to be a member of more than one rating bureau for the purpose of rating the same risks. * * *" (Underscoring supplied.)

We interpret the word "risks" as used in the foregoing language from Section 379.325, RSMo 1949, to refer to the three basic classifications of risks, namely "farm", "dwelling", and "commercial", and to any subdivision of those classes, when they are made the subject of "fire and allied lines" risk coverage. The company in question is now a member of the Missouri Inspection Bureau for the purpose of authorizing such rating bureau to file its public rating record pertaining to "commercial" risks upon which "fire and allied lines" coverage is now being written, and failure to adhere to the bureau's published rate on "commercial" risks when only fire and allied lines coverage is being written would, admittedly, be a deviation from a published rate and not permissible under Sections 379.350 and 379.355, RSMo 1949, reading as follows:

(379.350 RSMo 1949)

"No company or other insurer or agents shall directly or indirectly, by any special rate, tariff, drawback, rebate, concession, device or subterfuge, charge, demand, collect or receive from any person, persons or corporation any compensation and premium different from the rate or premium properly applicable to the property so rated, as indicated by its public rating record, and no company or other insurer shall discriminate unfairly

Honorable C. Lawrence Leggett

between risks of essentially the same hazard and substantially the same degree of protection."

(379.355 RSMo 1949)

"No fire insurance company or other insurer, nor any rating bureau shall fix and charge any rate for fire insurance upon property in this state which discriminates unfairly between risks in the application of like charges and credits, or which discriminates unfairly between risks of essentially the same hazards and having substantially the same degree of protection against fire."

The two statutes just quoted, Sections 379.350 and 379.355, RSMo 1949, were obviously in the mind of the legislature when it enacted Section 379.017, supra, reading, in part, as follows:

"1. Every insurance company * * * shall have authority to combine in single policies of insurance the perils of fire and allied lines with any one or more perils of casualty insurance which such company is authorized to make, and may charge therefor one indivisible premium or rate which may differ from the aggregate premium or rate applicable to separate policies covering the same property and risk or risks, and the difference in rates or premiums shall not be deemed to be unfairly discriminatory under the provisions of chapters 375 and 379, RSMo: provided, however, that any company issuing any policy combining coverages including protection against the peril of fire shall not discriminate unfairly between risks of essentially the same hazards and having substantially the same degree of protection.

"2. * * * and all combination of coverages approved by the superintendent shall be regulated by the provisions of sections 379.315 to 379.415, RSMo, which are not inconsistent with the authority herein granted." (Underscoring supplied.)

Honorable C. Lawrence Leggett

In view of the language quoted above from Section 379.017, supra, and giving special consideration to the underscored portion thereof, we resolve the main question to be answered in this opinion in the following language:

May the Superintendent of Insurance approve combination policies filed under Section 379.017 when the subject company's own public rating record discloses that the rate, applicable to commercial "fire and allied lines" risks (and forming only a component part of the ultimate indivisible premium rate authorized for the combination policy) differs from the commercial "fire and allied lines" risk rate published by the Missouri Inspection Bureau for the company?

To answer the foregoing question in the negative we must find a prohibition expressed either in Section 379.017, supra, or in Missouri's Fire Rating Act embraced in Sections 379.315 to 379.415, RSMo 1949, as amended.

It must be conceded that the combination policy does offer protection against the "peril of fire" as such language is used in the proviso of Section 379.017, supra, reading as follows:

"* * *: provided, however, that any company issuing any policy combining coverages including protection against the peril of fire shall not discriminate unfairly between risks of essentially the same hazards and having substantially the same degree of protection." (Underscoring supplied.)

The foregoing proviso from Section 379.017 must be given its full force and effect, and must be considered as a limitation on the language immediately preceding it which provides that the company:

"* * * may charge therefor one indivisible premium or rate which may differ from the aggregate premium or rate applicable to separate policies covering the same property and risk or risks, and the difference in rates or premiums shall not be deemed to be unfairly discriminatory under the provisions of chapters 375 and 379, RSMo: * * *."

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The language just quoted from Section 379.017 demonstrates that one indivisible premium or rate for the combination policy differing from the aggregate premium or rate applicable to separate policies covering the same property may result in discriminatory rates, but such language decrees that such discrimination is not to be considered unfair discrimination under the provisions of chapters 375 and 379, RSMo. However, it must be kept in mind that this language in Section 379.017 is directed only to the difference between the indivisible premium or rate for the combination policy and the aggregate premium or rate which would be arrived at if separate "fire and allied lines" risks and casualty risks were written in separate policies. Such language does not lessen in any degree the force and effect of the language appearing in the proviso found in Section 379.017, quoted here again as follows:

"* * *: provided, however, that any company issuing any policy combining coverages including protection against the peril of fire shall not discriminate unfairly between risks of essentially the same hazards and having substantially the same degree of protection."

Any indivisible rate or premium for the combination policy will, of practical necessity, have its component parts made up of charges applicable to each fire and casualty risk embraced therein. Legislative authority found in Section 379.017 to write the combination policy at an "indivisible" rate or premium modifies Section 379.315, RSMo 1949, as amended, of Missouri's Fire Rating Act only to the extent that paragraph 5 of such statute is not applicable to the combination policy. Paragraph 5 of Section 379.315, RSMo 1949, as amended, provides:

"5. Every fire insurance company or other insurer authorized to effect insurance against the risk of loss by fire, lightning, hail or windstorm shall upon request furnish to the holder thereof a written or printed analysis of the rate of premium charged for such policy, showing the items of charge and credit which determines the rate."

Section 379.017, supra, is not inconsistent with, nor does it modify language found at Section 379.325, RSMo 1949, of Missouri's Fire Rating Act reading as follows:

"1. All rating and actuarial bureaus which consist of two or more members shall be open for membership to all authorized companies and insurers applying therefor, but no company or insurer shall be permitted to be a member

Honorable C. Lawrence Leggett

of more than one rating bureau for the
purpose of rating the same risks. * * *
(Underscoring supplied.)

The word "risks", found in the underscoring portion of Section 379.325, supra, must necessarily refer to the three common classifications of risks to which "fire and allied lines" insurance coverage is directed, namely, "farm", "dwelling" and "mercantile." The question you have posed discloses that, as to the perils of "fire and allied lines", the combination policies to be issued by the subject company will have a rate of premium for that one component risk, contained in the combination policy, which will differ from the premium rate published by the Missouri Inspection Bureau for the company in question. In this we see a violation of that portion of Section 379.325, quoted supra, which prohibits a company from being a member of more than one rating bureau for the purpose of rating the same risks. When the subject company establishes its own public rating record from which you can ascertain what the premium rate is in relation to the "fire and allied lines" coverage going into the combination policy, and such premium rate differs from that filed by the Missouri Inspection Bureau on behalf of the subject company for its "mercantile" class of risks, the result is two public rating records for the purpose of rating the same risks.

In ruling the question we are fully cognizant of language found in Sections 379.350 and 379.355, RSMo 1949, of Missouri's Fire Rating Act, which prohibits discrimination in rates applicable to "fire and allied lines" insurance coverage, and the admonition found in Section 379.017, supra, deters us from predicating the answer to the question on a theory of discrimination in rates. The admonition found in Section 379.017, supra, just referred to is to be found in the underscoring language from the statute reading, in part, as follows:

"Every insurance company * * * shall have authority to combine in single policies of insurance the perils of fire and allied lines with any one or more perils of casualty insurance which such company is authorized to make, and may charge therefore one indivisible premium or rate which may differ from the aggregate premium or rate applicable to separate policies covering the same property and risk or risks, and the difference in rates or premiums shall not be deemed to be unfairly discriminatory under the

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provisions of chapters 375 and 379, RSMo:
provided, however, that any company
issuing any policy combining coverages
including protection against the peril
of fire shall not discriminate unfairly
between risks of essentially the same
hazards and having substantially the
same degree of protection. * * *

What has been said above discloses that a negative answer must be given to the question as restated in this opinion. Under Section 379.017, supra, as superintendent of insurance, you are directed to approve or disapprove the combination policies filed pursuant to such statute. Under the ruling here made, you are obligated to disapprove the submitted policies if circumstances surrounding issuance of the same are analogous to those outlined in the question, as restated in the opinion. Any order to the company in question to withdraw its membership from the Missouri Inspection Bureau for the purpose of rating its "mercantile" risks should be withheld pending action of the company upon your order of disapproval of the policies submitted.

CONCLUSION

It is the opinion of this office that the superintendent of insurance should disapprove for filing combination policies filed under Section 379.017, V.A.M.S., when the filing company's own public rating record discloses that the rate of premium, applicable to commercial "fire and allied lines" risks (and forming only a component part of the ultimate indivisible premium rate authorized for the combination policy) differs from the commercial "fire and allied lines" risk rate published for the filing company by the Missouri Inspection Bureau.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:gm

INSURANCE:

Articles of Incorporation of Security
Standard Life Insurance Company

September 14, 1960



Honorable C. Lawrence Leggett
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of September 12, 1960, in which you submitted to this office an executed copy of declaration of intention of original incorporators of the proposed Security Standard Life Insurance Company, which declaration of intent also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo, 1949. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070 RSMo, 1949, as amended.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070 RSMo, 1949, as amended, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1949, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General

JLO'M:ms

INSURANCE: Articles of Incorporation of Safeway Mutual
Insurance Company



October 14, 1960

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Mr. Leggett:

In compliance with your request of October 13, 1960, a copy of the original Articles of Incorporation of the proposed Safeway Mutual Insurance Company, together with proof of publication of the same as required by Section 379.030, RSMo 1949, have been reviewed by this office pursuant to the directive contained in Section 379.220, RSMo.

It is the opinion of this office that the Articles of Incorporation of the proposed Safeway Mutual Insurance Company, to be organized pursuant to the provisions of Sections 379.205 to 379.310, RSMo 1949, are in accordance with the provisions of said cited statutes, and not inconsistent with the constitution and laws of this state and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General

JLO:ms

INSURANCE: Articles of Incorporation of Fairfax Life Insurance Company

November 22, 1960



Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Department of Business and Administration
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of November 21, 1960, with which you submitted to this office an executed copy of declaration of intention of original incorporators of the proposed Fairfax Life Insurance Company, which declaration of intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1949. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070, RSMo 1949, as amended.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1949, as amended, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1949, as amended, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley,

Very truly yours,

JOHN M. DALTON
Attorney General

JLO:ms

INSURANCE: Articles of Incorporation of Life Insurance Company of
St. Louis.

December 8, 1960



Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Department of Business and Administration
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of December 5, 1960, with which you submitted to this office an executed copy of declaration of intention of original incorporators of the proposed Life Insurance Company of St. Louis, which declaration of intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1949. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070, RSMo 1949, as amended.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1949, as amended, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1949, as amended, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Very truly yours,

JOHN M. DALTON
Attorney General

JLO:ms

FERTILIZER: Penalties under fertilizer law assessed on basis
of monetary value of deficient nutrients. Treble
AGRICULTURE: penalty cannot be assessed when penalty is paid
to purchaser.

February 17, 1960



Honorable J. H. Longwell
Director, Division of
Agricultural Sciences
College of Agriculture
University of Missouri
Columbia, Missouri

Dear Dean Longwell:

This is in response to your letter of September 28, 1959, in which you raise questions with respect to the Missouri Fertilizer laws, Sections 266.290 through 266.350, V.A.M.S., revised to August 29, 1959. We quote your questions:

"1. Does the law intend that penalties shall be assessed on the basis of percent deficiency of plant nutrients or on the basis of monetary value of the deficiency?

"2. What disposal should be made of the money in excess of the 'actual value of the deficiency' - (266.347-1) when the assessed penalty is three times the total value (266.343-1a)?"

In answer to your first question, our interpretation of this statute must necessarily be based upon the intent of the statute made apparent by the wording of the statute in its entirety. It is our feeling that the law was intended to mean that penalties shall be assessed on the basis of a monetary value of the deficiency in the plant nutrients. In reaching our conclusion we would first bring your attention to the fact that before House Bill No. 236 became truly agreed to and finally passed by the 70th General Assembly, it was changed considerably with respect to the terminology used in referring to the basis for penalties. We quote Section 266.345 of House Bill No. 236 of the 70th General Assembly as it was introduced:

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"If any commercial fertilizer or fertilizer material offered for sale in this state shall upon official analysis prove deficient from its guarantee as stated on the bag or other container, to the extent of three per cent and not over five per cent, then the manufacturer of such commercial fertilizer or fertilizer materials or his agent shall be liable for the actual deficiency as shown by the official analysis. If the deficiency is over five per cent, then the penalty will be three times the amount of the total deficiency as found by the official analysis. The penalty shall apply only to the shipment sampled, and shall be assessed by and paid to the director."

You will note the differences in Section 266.340 as set forth above and Section 266.345 as set forth in House Bill No. 236, Truly Agreed To and Finally Passed. This is now Section 266.343, V.A.M.S., 1959, which we quote as follows:

"If any fertilizer offered for sale in this state shall upon official analysis prove deficient from its guarantee as stated on the bag or other container, penalties shall be assessed as follows:

(1) For a single ingredient fertilizer containing nitrogen or phosphate or potash:

(a) When the value of this ingredient is found to be deficient from the guarantee to the extent of 3% and not over 5%, the distributor shall be liable for the actual deficiency. When the deficiency exceeds 5% of the total value, the penalty shall be three times the actual value of the shortage.

(2) For multiple ingredient fertilizers containing two or more of the single ingredients: nitrogen or phosphate or potash, penalties shall be assessed according to (a) or (b) as herein stated. When a multiple ingredient fertilizer is subject to a penalty under both (a) and (b) only the larger penalty shall be assessed.

Honorable J. H. Longwell

(a) When the total combined values of the nitrogen or available phosphoric acid or potash is found to be deficient to the extent of 3% and not over 5%, the distributor shall be liable for the actual deficiency in total value. When the deficiency exceeds 5% of the total value, the penalty shall be three times the actual value of the shortage.

(b) When either the nitrogen, available phosphoric acid, or potash value is found deficient from the guarantee to the extent of 10% up to the maximum of two units, (2% plant food) the distributors shall be liable for the value of such shortages."

You will note that the final enactment was amended to incorporate the language of "values" and it distinguishes between penalties for single ingredient fertilizers and multiple ingredient fertilizers.

Unless the words "value" or "values" can be considered to mean monetary values, it would be our feeling that Subsection 1(a) of Section 266.343, above, would be inconsistent with Subsection 2(a). Subsection 1(a), in dealing with a single ingredient fertilizer, permits a deficiency of not more than three per cent. Under Subsection 2(a), which deals with multiple ingredient fertilizers, greater deficiencies in particular ingredients are possible under any construction of the law. However, in construing the values therein as monetary values, an over-all deficiency in monetary value in excess of three per cent is not permitted. So construed, Subsection 2(a) is consistent with Subsection 1(a) in that fertilizer which is sold must contain ingredients having a monetary value which is not more than three per cent less than the monetary value of the guaranteed ingredients. It is our belief that this new law has been enacted to protect the purchaser of such fertilizers from the sale of those materials which would be inconsistent with the tolerances allowed by this law. Therefore, it is our opinion that the law in question intends that penalties shall be assessed on the basis of the monetary value of the deficiency in the plant nutrients.

With respect to your second question, we set forth Section 266.347, V.A.M.S., 1959:

Honorable J. H. Longwell

"1. The penalties assessed by the director under Section 266.343 shall be paid by the distributor to the purchaser of such fertilizer, and in the event such purchaser cannot be ascertained, then said penalty shall be paid to the director and used for the purposes specified in section 266.320, except the maximum paid the purchaser will approximate the actual value of the deficiency.

"2. The director shall prepare a written certification of penalties assessed under section 266.343 addressed to the distributor. A copy of such certification of assessment shall be mailed to the distributor liable for the penalty.

"3. Any decision, finding, order or ruling of the director made pursuant to the provisions of Section 266.290 through 266.350 shall be subject to judicial review in the manner provided by Chapter 536, RSMo.

"4. If any distributor shall fail to pay any penalty assessed by the director after the time for judicial review has expired, or after any judgment or decree approving such assessment has become final, the person entitled to such penalty under the provisions of subsection 1 shall be entitled to bring a civil action to recover the same, and in such civil action such persons shall be entitled to recover from the distributor the amount of the penalty, a reasonable attorney's fee and costs of the action."

As above pointed out, by Section 266.343, under certain circumstances, the penalty to be imposed is three times the actual value of the shortage. However, under Section 266.347, when the identity of the purchaser is known, the penalty is to be paid to the purchaser, "except the maximum paid the purchaser will approximate the actual value of the deficiency." No provision is found for the disposition of the remainder of the penalty in such situation when a treble penalty is called for.

We presume that the absence of any express provision in this regard to have been an oversight on the part of the General Assembly. However, it is such an oversight as may not be supplied

Honorable J. H. Longwell

by either the director or this office, and must be remedied by the General Assembly alone. In the case of State v. Messner, 9 N.D. 186, 82 N.W. 737, the court stated: "If the legislature intends that penalties shall be recovered in a civil action, it must designate for whose benefit the recovery can be had. Failing in that, the penalty cannot be recovered." We feel that such conclusion is here applicable insofar as the Legislature has failed to provide for disposition of that portion of the penalty in excess of the value of the deficiency.

However, when the purchaser cannot be ascertained, the statute does make provision for disposition of the entire penalty by payment to the director. Therefore, the treble penalty should be assessed when called for in such circumstances.

Any lack of reason for the distinction between the two situations when the purchaser is known and when he is unknown does not require a different conclusion with respect to either of the situations. We merely construe the statute as written.

CONCLUSION

Therefore, it is the opinion of this office that:

(1) Penalties assessed under Section 266.343, V.A.M.S., are to be assessed on the basis of the monetary value of the deficiency of the plant nutrients;

(2) Penalties in excess of the actual value of the deficiency may not be assessed when the purchaser of the fertilizer is ascertained and the penalty paid to such purchaser.

The foregoing opinion, which was prepared by my Assistants, James B. Slusher and Robert R. Welborn, is hereby approved.

Yours very truly,

JOHN M. DALTON
Attorney General

JBS:RRW:ml

DRAINAGE DISTRICTS: With the permission of the land owners within
JOHNSON GRASS: the Birmingham Drainage District, and with the
permission of land owners immediately outside
of the Birmingham Drainage District, which are
adjacent to the river side of the levee, the Board of Supervisors of
the Birmingham Drainage District may expend funds in their hands for
the eradication of Johnson grass.

October 6, 1960



Honorable Richard E. McFadin
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Mr. McFadin:

This is in response to your letter of August 25, 1960, in which, with reference to the Birmingham Drainage District, organized by the decree of the Circuit Court of Clay County, Missouri, you ask the following question:

"The specific opinion which they desire from you is whether or not in the opinion of your office with the permission of the land owners within the District or immediately outside of the District adjacent to the river side of the levee they may expend funds in their hands for the eradication of Johnson grass."

You state that the supervisors of the Drainage District have contracted with the United States Corps of Engineers to maintain the levee by mowing it and maintaining it free from trees and shrubs in addition to many other requirements of maintenance.

In your letter of the 25th, you bring to our attention two sections of Chapter 242 which we think should be set forth in part as follows:

Section 242.190:

"1. In order to effect the drainage, protection and reclamation of the land and other property in the district subject to tax the board of supervisors is authorized and empowered . . . to construct and maintain main and lateral ditches . . . and any other works and improvements deemed necessary to preserve and maintain the works in or out of said district; * * * "

Honorable Richard E. McFadin

Section 242.330:

"1. The board of supervisors of said district shall have full power and authority to build, construct, excavate and complete all or any works and improvements which may be needed to carry out, maintain and protect the plan for reclamation. * * *

From the case law of Missouri, we are able to determine that the drainage district laws are to be construed and interpreted liberally so that they may effect the purpose for which they were written. In the case of Graves et al. v. Little Tarkio Drainage Dist. No. 1, et al., 134 SW2d 70, Division Number 1 of the Supreme Court of Missouri stated, at page 76, the following:

"[4,5] All the terms and provisions of the drainage act should be 'construed broadly and liberally to effectuate the wholesome and beneficial motives which prompted its enactment.' In re Big Lake Drainage District v. Rolwing, 269 Mo. 161, 171, 190 SW 261, 264; Wilson v. King's Head Drainage District. 257 Mo. 266, 289 165 SW 734, 740. Sec. 10808, RS 1929, Mo.St. Ann. §10808, pp. 3529, 3530, expressly provide that: 'This article is hereby declared to be remedial in character and purpose, and shall be liberally construed by the courts in carrying out this legislative intent and purpose.' * * *

We believe it may be considered that the extensive growth of Johnson grass could be a detriment to the proper maintenance of the levees and ditches, and that the Birmingham Drainage District would properly be concerned with its control and eradication. The General Assembly of the State of Missouri has gone so far as to pass special legislation, Sections 263.255 through 263.267, RSMo Cum. Supp. 1957, authorizing a tax to be levied in counties declared a Johnson grass extermination area, for purposes of eradication and control of Johnson grass. The question which you present does not bring into question the Johnson grass law, and we believe that there is no inconsistency between the requirements of that law and the opinion which this office is herein writing.

In considering the law as set forth above in the Little Tarkio

Honorable Richard E. McFadin

case, it is not difficult for us to conclude that the provisions of Chapter 242 which we have set forth are broad enough to justify the expenditure by the Birmingham Drainage District of some of its existing funds for the eradication of Johnson grass. We feel that this expenditure could be made within the district, and it could also be made outside of the District adjacent to the river side of the levee so long as this expenditure outside of the District is necessary to the proper maintenance of the District itself and so long as such expenditure is not in violation of the rights of any parties not associated with the Drainage District. You will note that Section 242.190, supra, authorizes the Board of Supervisors to construct and maintain the works and improvements in or out of said District. We think that this is broad enough to cover the situation which is apparently existing in and immediately around the Birmingham Drainage District.

CONCLUSION

It is the opinion of this office that, with the permission of the land owners within the Birmingham Drainage District, and with the permission of the land owners immediately outside of the Birmingham Drainage District, which are adjacent to the river side of the levee, the Board of Supervisors of the Birmingham Drainage District may expend funds in their hands for the eradication of Johnson grass.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James B. Slusher.

Very truly yours,

JOHN M. DALTON
Attorney General

JBS/mlw

SCHOOLS:
COUNTY BOARDS OF EDUCATION:
DISQUALIFICATION OF MEMBERS:

A portion of Section 165.667 RSMo 1949, disqualifying member of county board of education who changes his residence to same municipal township or school district in

which another board member resides, strictly construed. It has no application to board member who has not changed residence, but because of reorganization of smaller pre-existing school districts to form larger district with extended boundaries, member's residence is located in same school district as that of another member, former member not disqualified and will continue to serve remainder of term.

February 19, 1960



Honorable Roy W. McGhee, Jr.
Prosecuting Attorney
Wayne County
Greenville, Missouri

Dear Mr. McGhee:

This is to acknowledge receipt of your request for our legal opinion, which reads as follows:

"Section 165.667 RSMo 1949, relative to the County School Board provides in part as follows:

" - - - Any member - - - who changes his residence to a - - - school district in which another member of the Board resides, shall be disqualified as a member of the Board. - - -"

"Where, after the election of members of the County Board of Education, two or more school districts in the county are legally joined together, by reorganization or otherwise, to form a new and larger district which includes several smaller pre-existing districts, can the members of the then County Board of Education continue to serve as such until the next election, or are they disqualified by the fact of reorganization placing them in the same (new) school district?"

Honorable Roy W. McGhee, Jr.

"We would appreciate your prompt opinion on this matter as it may become a question of substantial local importance here in the immediate future."

In considering this inquiry we call your attention to Section 165.657, RSMo Cum. Supp. 1957, regarding county boards of education, meetings, election of officers and members. We are especially concerned with the disqualification, election and term of office of each individual member of the board, and quote the applicable portion of the section as follows:

"2. Each member shall be a citizen of the United States and of the state of Missouri, a resident householder of the county, and shall be not less than twenty-four years of age. Not more than three members of the board shall reside in any county court district and not more than one member of the board shall be chosen from the same municipal township or school district, except that if there are less than three municipal townships or school districts in any county court district, the district shall have as many members of the board as it contains municipal townships or school districts and the remainder of the board shall be elected at large but shall reside in the county court district."

We are also concerned with the proposition as to when members of the county board of education may become disqualified as provided by Section 165.667, RSMo 1949, and we quote the applicable portion of that section, which reads as follows:

"Four members of the board shall constitute a quorum. Any member who is absent from board meetings two or more consecutive times without majority approval of the board, or who changes his residence to another county court district, or any member, except those elected at large, who changes his residence to a municipal township or school district in which

Honorable Roy W. McGhee, Jr.

another member of the board resides,
shall be disqualified as a member of the
board. * * *

For purposes of our discussion it will be assumed that the members of the county board of education referred to in the opinion request were legally qualified at the time they took office. The question now arises as to whether or not some of them have become disqualified under provisions of Section 165.667, supra, because two or more board members now reside in the same school district.

From said statutory requirement it appears that in the event a county school board member were to voluntarily change his residence to another municipal township or school district of the county in which another member of the same board resides then the former would become disqualified and be subject to ouster from office.

A somewhat different situation is presented in the opinion request than that to which the section refers and which we understand to be that a legally qualified member of the board at the time of his election who has not changed his residence, and through no fault of his own, his residence is now located in the same school district as that of another board member, because of the merger of some smaller pre-existing school districts to form a new and larger district. The disqualifying provisions of the statute are very limited and do not cover circumstances of the kind referred to above unless it is the legislative intent that the scope of the expressed disqualifications of board members is to be extended by necessary implication to include circumstances such as those referred to in the opinion request.

In attempting to determine the scope of the disqualifications as intended by the legislature, we find it helpful to refer to the general rule as to how statutory disqualifications of public officers are to be construed. We find such a general rule given in C.J.S., Volume 11, page 126, Section 11, "Officers" which reads as follows:

"Provisions in statutes and constitutions imposing qualifications should receive a liberal construction in favor of the right of the people to exercise freedom of choice

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in the selection of officers, and in favor of those seeking to hold office; and ambiguities should be resolved in favor of eligibility to office. It does not follow, however, that the courts should give words an unreasonable construction in order to uphold the right of one to hold office. Disqualifications provided by the legislature are construed strictly and will not be extended to cases not clearly within their scope, although it has been held that a statute making an officer ineligible for the same or a similar position for a specified time in case of his removal from office for specified causes should be liberally construed to effectuate its object. * **"

In the case of State ex rel. Mitchell v. Heath, 345 Mo. 226, 1.c. 230 approved such general rule and said:

"[3] Section 9287, Revised Statutes 1929, provides that common school districts shall be governed by a board of three directors, 'who shall be citizens of the United States, resident taxpayers of the district (21 years of age), and who shall have paid a state and county tax within one year next preceding his, her or their election, and who shall have resided in this state for one year next preceding, his, her or their election.' The decisive question here is whether or not respondent, under the admitted facts, has complied with the above italicized part of the section prescribing qualifications essential to his eligibility to the office of school director. [Sec. 9328, R. S. 1909, prescribes this same qualification for directors of City, Town and Consolidated schools; see also Secs. 9517 and 9572, R. S. 1929, for qualifications in larger cities where strangely this requirement is relaxed or abolished.] It should also be noted that substantially the same provision is made concerning qualifications of members of both houses of the General Assembly. [Const., Art. 4, Secs. 4 and 6.] The evident purpose of this requirement is to have such officers,

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who impose taxes on others and determine how they shall be spent, chosen from among those citizens who have been paying, and will likely continue to pay, taxes. It is said, however that such 'statutes imposing qualification should receive a liberal construction in favor of the right of the people to exercise freedom of choice in the selection of officers.' [46 C.J. 937, sec. 32.] The Missouri decisions have given a liberal construction to this and similar sections prescribing requirements of eligibility to elective offices. * * *"
(Underscoring supplied).

It is believed the legislature was fully aware of the above-mentioned general rule at the time they enacted Section 165.667, supra. Only two grounds for disqualification of board members are mentioned in the section, and we are concerned only with the second one.

The second one does not provide for the disqualification of a board member who has not changed his residence, but because of the reorganization of some smaller school districts of the county, his residence is located within the geographical boundaries of a municipal township or school district in which the residence of another school board member is located.

If the lawmakers had intended to include such a provision in the section then it is believed they would surely have done so. In the absence of such statutory provisions, and in view of the fact that such expressed disqualifications are to be strictly construed, we cannot by implication, construe such provision, and particularly the second one, to include circumstances such as those referred to in the opinion request, and thereby broaden the scope of said provisions beyond the intent of the lawmakers.

CONCLUSION

Therefore, it is the opinion of this office that a portion of Section 165.667 RSMo 1949, which provides that a member of a county board of education who changes his residence to a municipal township or other school district of the county in which another

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member of the board resides, shall be disqualified as a board member, shall be strictly construed. Such disqualification has no application to a legally qualified board member who has not changed his residence, but because of the reorganization of some smaller pre-existing school districts of the county to form a new and larger district with extended boundaries, said board member's residence is then located in the same school district in which another board member resides. Such board member will continue to serve for the remainder of his term.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,

John M. Dalton
Attorney General

PNC:vlw

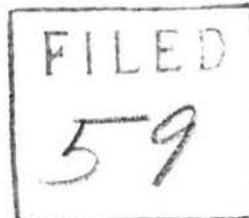
SCHOOLS:

1. Section 165.257, RSMo 1949, is applicable to every school district in Missouri not

REORGANIZED DISTRICTS: maintaining approved high school offering work through twelfth grade. 2. Pupil living in reorganized district does not have unrestricted right to attend high school in any other district. Right to attend school of choice subject to limitations of Section 165.257, RSMo 1949. 3. When reorganized district not maintaining high school provides transportation for resident pupils to approved high school of adjoining district and some of said pupils are provided transportation by another adjoining district to its high school, reorganized district is obligated to pay for transportation in excess of specified state aid to said other adjoining district.

May 19, 1960

Honorable Hendrix H. McNabb, Jr.
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri



Dear Sir:

This office is in receipt of your request for a legal opinion which reads as follows:

"School District R-LX, Bates County, Missouri, is a re-organized school district under the provisions of Chapter 165 R.S. Mo. 1949. The district does not maintain a high school but does maintain its own transportation system. Shortly after organization, arrangements were made to transport high school pupils to the consolidated school in Appleton City, Missouri, which is an adjoining district, and paid the tuition and cost of transportation. Six of the approximately fifty-five high school students refused to attend the Appleton City School and insisted on going to Butler High School, another consolidated adjoining district. Both schools are approved. The six children in question have been riding the buses of the Butler system although the regular bus routes of District R-LX go immediately in front of each of their houses. The Butler district has made a claim for transportation expenses of such students.

"Obviously, District R-LX, if obligated to pay such expenses will be subjected to considerable expense which would seem to be unnecessary, particularly in view of the fact that they could provide transportation for these students without extra cost on their own transportation system. If the district can be required to pay transportation as well as tuition expenses to any school in adjoining districts of the choice of the pupils or their

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parents, it would seem to create the possibility of children changing schools for trivial reasons such as becoming disgruntled with an instructor or a course of study, so that the district's transportation system would become greatly disorganized and the district subjected to a terrific financial burden.

"Based on the above facts, your opinion is respectfully requested on the following questions:

"1. Is a re-organized school district, which has no high school but maintains its own transportation system and has arranged its bus schedules so as to pick up each high school student at his door and transport him to an approved high school in an adjoining district, obligated to pay all transportation costs of another adjoining district if the student choses to attend the school at such adjoining district?

"2. Does a student living in a re-organized district have the unrestricted right to attend high school in any other district?

"3. Do the provisions of Section 165.257 RSMo 1949, which would appear to apply only to common school districts apply to re-organized school districts?"

Section 165.257, RSMo 1949, is referred to in the opinion request, and among other matters provides that a school district shall pay the tuition of its nonresident high school pupils. Said section reads as follows:

"The board of directors of each and every school district in this state that does not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or an adjoining county, or an approved high school maintained in connection with one of the state institutions of higher learning,

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where work of one or more higher grades is offered; but the rate of tuition paid shall not exceed the per pupil cost of maintaining the school attended, less a deduction at the rate of fifty dollars for the entire term, which deduction shall be added to the equalization quota of the district maintaining the school attended, as calculated for the ensuing year, if said district is entitled to an equalization quota, if the district maintaining the school attended is not entitled to an equalization quota, then such deduction shall be added to the teacher quota of said district, as calculated for the ensuing year, but the attendance of such pupils shall not be counted in determining the teaching units of the school attended. The cost of maintaining the school attended shall be determined by the board of such school district but in no case shall it exceed all amounts spent for teachers' wages, incidental purposes, maintenance and replacements. Per pupil cost of the school attended shall be determined by dividing the cost of maintaining the school by the average daily pupil attendance. In case of any disagreement as to the amount of tuition to be paid, the facts shall be submitted to the state board of education, and its decision in the matter shall be final. Subject to the limitations of this section, each pupil shall be free to attend the school of his or her choice; but no school shall be required to admit any pupil, or shall any school be denied the right to collect tuition from a pupil, parent or guardian, if the same is not paid in full as hereinbefore provided. In no case, however, shall the amount collected from a pupil, parent or guardian exceed the difference between fifty dollars and the per pupil amount actually paid by the state, nor shall the amount the district of the pupil's residence is required to pay exceed the amount by which the per pupil cost of maintaining the school attended is greater than fifty dollars. If, for any year, the amount collected from a pupil, parent, or guardian exceeds the difference between fifty dollars and the per pupil amount actually paid by the state, the excess shall be

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refunded as soon as the fact of an overcharge is ascertained." (Underscoring ours.)

The above quoted section is found in that portion of Chapter 165 of the Revised Statutes of Missouri dealing with common school districts, and it unquestionably applies to such districts. The question as to whether the section, which appears to apply exclusively to common school districts, also applies to reorganized school districts, and as posed in the third inquiry herein, is quite another matter. Said question is believed to be of such vital importance that it must first be discussed and satisfactorily answered before attempting to discuss or answer the other inquiries of the opinion request. In view of this fact we believe it is necessary to discuss the third inquiry at this time.

The mere fact that Section 165.257 is found in that part of Chapter 165 of the statutes referring to common schools is not determinative or even persuasive that said section is exclusively applicable to such schools. Rather it is believed the provisions of the section, the intention and purpose of the lawmakers at the time of the enactment of same are matters of first consideration in construing the statute and determining its applicability to other than common school districts.

From the first underscored portion of Section 165.257, supra, we call attention to the words "The board of directors of each and every school district in this state that does not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or an adjoining county, * * * *"

It is readily seen that this language is very broad in meaning, and could, and we believe it does, refer not only to common schools but to others as well.

In the event the section applies to only common schools, then all others, regardless of the type, would be excluded from the operation of the section and the benefits therein provided. Unfortunately, in that situation, a pupil of another district would be unfairly discriminated against, since his residence would be in a district not liable for the payment of his tuition, consequently, the pupil, his parents, or guardian would be required to pay his tuition expenses. In many instances this would result in hardship to the pupil or his parents and such a procedure might even be the means of depriving him or countless others of the privilege of attending high school.

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It is believed the Legislature was fully cognizant of the result that would necessarily follow in the event they enacted a law solely beneficial to common school districts, and their pupils. It is further believed that they had no intention of enacting such a law and that the one they did enact in the form of Section 165.257 offers equal educational opportunities to pupils of all school districts in the state.

A statutory rule of construction to be followed, and one having a particular significance is that school laws are to be liberally construed. This long established principle was reaffirmed by the court in the case of State v. Tillatson, 312 S.W.2d 753, at l.c. 757, which reads as follows:

"[8] In considering the application of our school laws we must remember the repeated and universal expressions of our courts to the effect that they are to be interpreted liberally, and that substantial compliance with the statutes is sufficient, for generally these laws are administered by laymen. State ex rel. School District No. 34 v. Begeman 221 Mo. App. 257, 2 S.W.2d 110; State ex rel. Acom v. Hamlet, 363 Mo. 239, 250 S.W.2d 495; Reorganized District R-IV v. Williams, Mo. App., 289 S.W.2d 126; School District No. 16 v. New London School District, 181 Mo. App. 583, 164 S.W. 688; State ex inf. Mansur ex rel. Fowler v. McKown, 315 Mo. 1336, 290 S.W. 123."

If it had been the legislative intent the section was to apply to common school districts and to no others, then the law-makers would undoubtedly have placed some such limitation therein, or else they would have employed language from which the unmistakable and necessary implication could be drawn that said section was intended to refer to common school districts alone.

In the absence of any such express provisions or necessary implication to be drawn from the express provisions, it cannot be said the statute refers only to common school districts, but that it refers to other types of districts including reorganized districts.

Therefore, in answer to the third inquiry, it is our thought the provisions of Section 165.257, RSMo 1949, are applicable to every

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school district in Missouri not maintaining an approved high school offering work through the twelfth grade.

The second inquiry is whether a student living in a reorganized district has the unrestricted right to attend high school in any other district.

In this connection we call attention to a portion of Section 165.257 quoted above and which reads: "Subject to the limitations of this section, each pupil shall be free to attend the school of his or her choice."

This statutory authorization permits a pupil to choose any high school he or she may desire to attend and upon first thought grants an unlimited right of selection to the pupil. Upon closer scrutiny it is found that such is not the case. In effect, the section provides that the right of the pupil to choose a school shall be exercised only in accordance with, and subject to the limitations of that section.

In view of the foregoing, our answer to the second inquiry is that a student living in a reorganized district does not have the unrestricted right to attend high school in any other district, as the right to attend a school of his choice is subject to the limitations provided by Section 165.257, RSMo 1949.

The first inquiry reads as follows:

"1. Is a re-organized school district which has no high school but maintains its own transportation system and has arranged its bus schedules so as to pick up each high school student at his door and transport him to an approved high school in an adjoining district, obligated to pay all transportation costs of another adjoining district if the student chooses to attend the school at such adjoining district?"

In an opinion of this office written for Honorable Harry J. Mitchell, prosecuting attorney of Marion County, on June 19, 1953, the factual situation is similar to that involved in the present request. We enclose a copy of this opinion.

There the Palmyra school district and the Monroe City school district had been providing transportation for the high school pupils of a rural district. One of the questions considered was

Honorable Hendrix H. McNabb, Jr.

whether or not the rural district was legally required to pay for the transportation of its high school pupils. Regarding said inquiry, it was concluded there was no requirement that either the receiving or sending district provide free transportation of pupils attending high school in a district different from their residence, but if such transportation is provided, the sending district is obligated to pay the cost of transportation in excess of the specified state aid, provided such obligation can be met with available funds and revenue realized through the maximum constitutional levy without voter approval.

We have previously given it as our opinion that R-IX district had the obligation of paying the tuition of all of its students who attended high school in another district under provisions of Section 165.257 and that subject to the provisions of that section the pupils were free to attend the school of their choice.

It is further believed, for reasons given in the Mitchell opinion, that although R-IX district was not required to provide free transportation of its pupils to attend high school in another district, or districts, yet when transportation was provided for said pupils by districts R-IX, and Butler, then the former district was obligated to pay for such transportation to the latter. However, the obligation of R-IX as sending district to pay transportation costs of its six pupils to Butler as receiving district, does not extend to the total amount of such transportation costs, but is limited and requires the payment only of an amount in excess of specified state aid.

CONCLUSION

Therefore, it is the opinion of this office that:

(1) The provisions of Section 165.257, RSMo 1949, are applicable to every school district in Missouri not maintaining an approved high school offering work through the twelfth grade.

(2) A pupil living in a reorganized school district does not have the unrestricted right to attend high school in any other district, as the right to attend the school of his choice is subject to the limitations provided by Section 165.257, RSMo 1949.

(3). When a reorganized school district not maintaining high school provides transportation for its resident pupils to an approved high school of an adjoining district and some of said pupils are provided transportation by another adjoining district, whose approved high school they choose to attend, said reorganized

Hendrix H. McNabb, Jr.

district is obligated to pay the cost of such transportation in excess of specified state aid.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul M. Chitwood.

Yours very truly,

John M. Dalton
Attorney General

Enclosure (1) copy of
opinion to Harry J. Mitchell
6-19-53.

ENC:10:W

SCHOOLS: Petition for annexation of one school district to another void when districts did not adjoin at time of filing petition. County board of education acquires jurisdiction by submitting plan of reorganization subsequently.

January 28, 1960



Honorable Harry J. Mitchell
Prosecuting Attorney
Marion County
Palmyra, Missouri

Dear Mr. Mitchell:

This is in response to your request for opinion dated November 14, 1959, which reads as follows:

"At the request of the County Superintendent of Schools of Marion County, Missouri, I am transmitting to you for opinion the legal problem as follows:

On the 15th day of September, 1959, twenty-three petitioners filed with the District Clerk of Davis School District of Marion County, Missouri, a petition as follows: 'Petition to the Board of Directors of the Davis School District of Marion County, Missouri.'

'We, the undersigned, being qualified voters of the above named school district, hereby petition you, as the governing board of said school, to order a special election to determine by the voters of said school district whether they shall annex said school district to the re-organized Monroe City School District now designated as R--I in Monroe County, Missouri, if either Pee Dee or White Franklin School Districts become annexed to R--I during the present school year of 1959-1960.'

Honorable Harry J. Mitchell

"At the time of the filing of the Davis School District Petition, the Davis School District was not contiguous to the Monroe County R--I School District. The Pee Dee District voted annexation to the Monroe City R--I School District on the 3rd day of October, 1959, and the annexation was accepted by the Monroe County R--I Board of Education on the 5th day of October, 1959, and thereupon the Davis School District was contiguous with the Monroe County R--I District.

"On the 8th day of October, 1959, the Marion County Board of Education filed a reorganization plan for Marion County School District R--II with the State Board of Education, and in this plan approximately fifty per cent of the Davis School District was included in the proposed reorganization of Marion County District R--II.

"The plan of the Marion County Board of Education for reorganization of Marion County District R--II was not approved by the State Board of Education, because of uncertainty as to priorities regarding the Davis School District petition, and the Marion County Board of Education reorganization plan.

"The question is whether or not the State Board of Education may approve and the Marion County Board of Education proceed with the reorganization plan for Marion County School District R--II, including a portion of the Davis School District, and with the Davis School District petition pending, or is it necessary that the Marion County Board of Education either await the results of the Davis School District petition, or eliminate the portion of the Davis School District from the plan before proceeding?"

Honorable Harry J. Mitchell

The answer to your question must be preceded by a determination of whether jurisdiction of the area in question was first acquired by the filing of the petition for annexation or by the submission of the plan of reorganization to the State Board of Education. As was said in Willard Reorganized Sch. Dist. v. Springfield Reorganized Sch. Dist., 241 Mo. App. 934, 248 SW2d 435, 1.c. 443:

" * * * in a dispute between two political subdivisions as to which may annex a given territory, the one which first took a valid step toward effecting the annexation assumes jurisdiction which it retains throughout, regardless of which one first takes the steps which finally complete the annexation."

As far as the time element is concerned, there is no question but that the petition for annexation preceded the preparation and submission of the plan of reorganization so that the only question is whether the petition for annexation was a valid one.

This question was raised in the Willard case, supra. The court quoted Section 165.300, RSMo, C.S. 1957, which reads, in part, as follows:

"Whenever an entire school district, or a part of a district, whether in either case it be a common school district, or a city, town or consolidated school district, which adjoins any city, town, consolidated or village school district, including districts in cities of seventy-five thousand to seven hundred thousand inhabitants, desires to be attached thereto for school purposes, upon the reception of a petition setting forth such fact and signed by ten qualified voters of such district, the board of directors thereof shall order a special meeting or special election for said purpose by giving notice as required by section 165.200; provided, however, that after the holding of any such special election, no other such special election shall be called within a period of two years thereafter."

Honorable Harry J. Mitchell:

The court then said, Mo. App. 1.c. 946:

"Under the admitted facts Ritter District did not adjoin Willard District at the time of the filing of the petition, October 18th. Schuyler School District was between the two districts and was not adjoined to Willard District until November 3rd, at which time Willard District did become an adjoining district to appellant district but appellant contends that under the law it was not necessary to be an adjoining district when the petition was filed to have the proposition submitted to the voters but that when the vote was taken, to-wit: November 6th, and the voters approved the annexation, that was all that was necessary to make the annexation legal and binding.

"The judgment of the trial court on this proposition is as follows: (X)

'That the proceedings seeking to annex the former Ritter District 62 to plaintiff, begun by filing a petition with the Ritter School Board on October 18, 1950, and approved by the voters of Ritter District on November 6, 1950, were void and of no effect because said Ritter District 62 did not join plaintiff district when said proceedings were begun.'

"We heartily concur in the finding of the trial court. We think that the statute above quoted contains plain language requiring that said district be an adjoining district when proceedings were started for the purposes of annexation.

* * * * *

" * * * To emasculate the plain meaning of the statute requiring that school districts be adjoining districts before proceedings can be had to annex the same would be performing the acts of the legislature in repealing the law as it is and it is not the duty of the court to write laws but to interpret them.

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"State ex rel. Gentry v. Sullivan, Mo. Sup., 320 Mo. 362, 8 S.W.2d 616, 618, the court states the rule of law thus.

' * * * Prefatory to a discussion of the legality of that proceeding, mere irregularities will be disregarded. By this we mean such acts of omission or commission in the process of organization which do not run counter to the evidently mandatory requirements of the Constitution or the statute, nor deprive the voters of an opportunity to exercise their will in the formation of the consolidated district. * * *'

"We hold that the statutory requirement involved in this case, that the school districts be adjoining before proceedings can be taken to annex the same, is mandatory."

(We have quoted from the official report because of an error appearing in the S.W. reporter at the place marked (X) above.)

We are aware of the slight difference between the facts presented in your letter and those of the Willard case, in that in your situation the districts did become contiguous before the reorganization plan was presented to the State Board of Education. However, we do not think that this would alter the conclusion because the fact remains that they were not adjoining at the time the petition was filed, which the Willard case says is mandatory.

This being so, the petition to annex the Davis District to R-I of Monroe County was a nullity and of no effect. Therefore, the county board of education acquired jurisdiction when it submitted its plan of reorganization to the State Board of Education and it may proceed as if the annexation petition had never been filed.

CONCLUSION

It is the opinion of this office that the petition for annexation of Davis School District of Marion County to R-I of Monroe County, filed September 15, 1959, at a time when the Davis District did not adjoin the R-I District, is void and of

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no effect. It is the further opinion of this office that the Marion County Board of Education has acquired jurisdiction over that part of the Davis District included within its plan of reorganization filed with the State Board of Education on October 8, 1959, and may proceed as if the annexation petition had never been filed.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

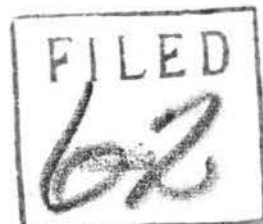
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COUNTIES:
COUNTY COURTS:
RABIES:
HEALTH:

The county court of a third-class county does not have authority to appoint a rabies control officer or to authorize the county health center trustees to do so. Without authority for appointing such rabies control officer public funds may not be used to pay the salary of any such officer.

July 13, 1960

Honorable William B. Milfelt
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri



Dear Mr. Milfelt:

You have recently requested from this office an opinion concerning the authority of the county court to appoint and pay a rabies control officer and, in this connection, you have asked the following questions:

"Does the County Court of Jefferson County have the authority to order the Trustees of the Jefferson County Health Department to appoint a Rabies Control Officer.

"Does the County Court have the authority to order the Trustees of the Jefferson County Health Department to pay the salary of such Rabies Control Officer from the funds of the Health Department.

"Do the Trustees of the Jefferson County Health Department have the authority to appoint a Rabies Control Officer to conduct the duties as contained in their suggested draft heretofore recited, said officer to operate in the whole of Jefferson County, excepting incorporated areas.

"Do the Trustees of the Jefferson County Health Department have the authority to pay the salary of such Rabies Control Officer appointed by said Trustees from Health Department funds."

Although your request for this opinion refers to the "County Department of Health," there is no statutory authority for such a department in a county of the third class, and it

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is assumed that this title is a misnomer. Inquiry of the State Department of Health has revealed that your reference is probably to the trustees of the county health center. We are writing this opinion on the basis of the assumption that this is correct and will refer to the "Trustees of the County Health Center" rather than to the "County Health Department." Since there is no statutory authority for a "County Health Department," such department could, of course, have no powers or duties in this matter.

It appears that the county court of Jefferson County has heretofore issued a quarantine order because of the prevalence of rabies in the county. It is presumed that this action was taken pursuant to the provisions of Section 322.050, RSMo 1957 Supplement. The statutes provide, by Section 322.060, that such quarantine order shall be enforced by all police officers, town marshals and constables. Section 322.070 provides that all expenses of the quarantine shall be paid out of public funds. It is specifically provided that the police officers, town marshals and constables shall receive for their duties in this respect "such fees and mileage as is provided by law for the performance of their other like duties."

Thus, the statutes have specified the officers whose duty it is to enforce such quarantine order and, likewise, has provided the method of compensating such officers for the performance of such duties. Therefore, in the absence of any authority conferred upon them by statute, the county court does not have authority to appoint a rabies control officer or to authorize the county health center trustees to appoint such officer. Likewise, without statutory authority for the payment of compensation of such rabies control officer the county court does not have authority to pay or to authorize the payment of compensation or expenses to such officer.

This result follows even more forcibly where the statute has specifically provided for the enforcement of such quarantine order and for the compensation of the officers whose duties it is to enforce such order.

As is pointed out above, the county court acts in promulgating the quarantine order and the duty of enforcement falls upon the police, town marshals and constables. Under such

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circumstances the county health center trustees have no function in the field, and they are clearly without authority to appoint a rabies control officer or to use any funds in their hands to pay said officer.

9

The statutes do not give any authority to the county court of a third-class county to promulgate regulations or instructions for the enforcement of the quarantine order. In such circumstances the county court is without authority to promulgate the proposed "instructions" to the rabies control officer. The Legislature has not seen fit to authorize the creation of a county dog pound or to require the payment of fees by the dog owner when such dog is impounded by a third-class county. When such a system was desired, it was provided for by the Legislature for counties of the first class, by Sections 322.090 et seq., RSMo 1949. Consequently, Jefferson County is without authority to create such a dog pound or to impose such liability on dog owners.

The method of enforcement of the quarantine order is provided for by statute, and neither the county court nor the county health center trustees have power to legislate in this field.

CONCLUSION

It is, therefore, on the basis of the foregoing, the conclusion of this office that the county court of a third-class county does not have authority to appoint a rabies control officer or to authorize the county health center trustees to do so. Without authority for appointing such rabies control officer public funds may not be used to pay the salary of any such officer.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Fred L. Howard.

Very truly yours,

John M. Dalton
Attorney General

FLH:lc:gm

CITIES:
CITY ELECTIONS:
ELECTIONS:
ELECTION EXPENSES:
SCHOOL DISTRICTS:
SCHOOL DISTRICT ELECTIONS:
VOTING MACHINES:

Whenever a school district, located primarily but not wholly, within a third class city holds its annual election in conjunction with the city's annual election, the school board shall be responsible for those election expenses which are in addition to the election expenses normally expended by the city for an election.

August 25, 1960



Honorable John W. Mitchell, Secretary
Jackson County Board of Election Commissioners
Courthouse
Independence, Missouri

Dear Mr. Mitchell:

I am in receipt of your letter dated June 24, 1960, in which you quote in full the letter of Mr. Rufus Burrus. Mr. Burrus' letter requesting our opinion is as follows:

"Request for your opinion about division of costs of election to be held on April 5, 1960, wherein the City of Independence, (a City of the third class) and the School District No. 30, of Independence, Missouri (a six director school district with High School), have issues to be submitted. The Jackson County Board of Election Commissioners is the agency authorized to hold the annual election for officers, city levy authorization and bond election for the City of Independence on April 5, 1960.

"The School District has its annual election for directors, and for a levy authorization on the same day, April 5, 1960. The boundaries of the School District do not coincide with the boundaries of the City of Independence, although a major part of the School District lies in the limits of the City. The School election by virtue of paragraph 4, of Section 165.315, Laws of Missouri 1955, p. 570, is required to be "conducted as provided in section 165.467, R.S. Mo. 1955, p. 570, Sec. 1". Sec. 165.467, (R.S. Mo. 1955, p. 570) par. 3 provides for certain expenses to be "at the expense of the School District." This Board of Election Commissioners provide "voting machines" and "permanent registration lists of voters,"

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and therefore "ballot boxes" and "poll books and voters' identification certificates" are not used.

"There will be one ballot printed for the voting machine, with the City officers and propositions appearing thereon, and the School officers and proposition will also appear thereon. There are 6 officers and 2 propositions for the City, and 4 officers and one proposition for the School District.

"There will be the expense of delivering about 45 voting machines to the voting places, and there will be judges and clerks in each polling place and there will be rental of some polling places. There will be Deputy Election Commissioners on duty that day and at least 2 men to dispatch the voting machines and to receive them when returned. There are expenses for the return of supplies from the various precincts. There will be a printing of sample ballots with instructions to be placed in the polling places.

"Will you please advise this Board what part of the above expenses, if any, should be charged to the School District and what part shall be charged to the City?

"Does the School District have any authority to expend its funds for any election costs not enumerated in 165.467, and do such costs as above enumerated come within those enumerated in 165.467."

The questions raised in Mr. Burrus' letter are predicated upon the applicability of Section 165.467, RSMo, Cum. Supp. 1957. It is submitted that Section 165.467 is not relevant because Section 165.315, RSMo, Cum. Supp. 1957 no longer applies to School District No. 30, of Independence, Missouri. This reasoning is based on the statement made by Mr. Burrus that "The boundaries of the School District do not coincide with the boundaries of the City of Independence, although a major part of the School District lies in the limits of the city."

Section 165.315, reads as follows:

"1. In any school district in a third class

city now or hereafter having more than thirty-five thousand inhabitants, candidates for school directors may be nominated by a majority of the members-elect residing in the school district of each political party committee of the city in which the school district is located.

"2. A certificate of nomination signed by the chairman of the party city committee or by a majority of the members-elect of the committee, giving the names of the candidates and certifying that they have been selected by a majority of all the members-elect of the committee shall be filed with the secretary of the board of education not later than ten days before the election. Any vacancy in the nomination by resignation, death or otherwise, occurring after the filing of the certificate and before the election, may be filled by the proper committee and an affidavit shall be made by one or more members of the committee covering all of the facts, and presented to the judge of the circuit court, who shall grant, under his hand and seal of the court, a certificate covering the facts which certificate shall be filed with the secretary of the board of education.

"3. Directors for such school districts may also be nominated by petition signed by a number of qualified voters in the city which shall equal four per cent of the total vote cast for mayor at the next preceding mayoral election.

"4. All elections for school directors shall be conducted as provided in section 165.467, RSMo." (Emphasis added.)

A reasonable interpretation of the phrase "in a third class city" would seem to include only that which is within, and to exclude that which is without or only partly within. In Mackay v. Commonwealth Casualty Co., 224 Mo.App. 1100, 34 SW2d 564, the court said at page 566 of the reporter:

" * * * We find in Webster's Dictionary that the word 'within' is given as a synonym of the word 'in', and we think that, as applied

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to location as being on the inside or outside of an inclosure, they are synonymous, the context or form of expression determining which should be used."

A problem of statutory interpretation, quite similar to the phrase "in a third class city," arose in Town of Alexandria v. Clark County, 231 SW2d 622. A statute in that case allowed the mayor and members of the city council of any city or town "within any special road district" to help appoint the board of commissioners of the district. The Town of Alexandria was about 90 per cent within a road district and about 10 per cent without. The court, in holding that the statute did not apply to Alexandria, said on page 624:

"It is true that the statute does not say 'wholly within' which is not synonymous with 'partly' which refers to a situation where a part of a territory is without the district. * * * But, neither does the statute employ the phrase 'partly within' or 'substantially within' which would be interpolated into the statute if the appellant's interpretation of the statute prevailed. Had the legislature intended that interpretation it could have provided for it; * * *"

To further support the proposition that Section 165.315 does not apply to a school district which is only partly within a third class city, it should be noted that the statute has provisions for nomination by a majority of the members-elect of each political party committee "of the city", or by a petition signed by a specified number of qualified voters "in the city." There is no mention of the procedure to be followed by those who do not live in the city, but live in the school district.

If Sections 165.315 and 165.467 do not apply to School District No. 30, of Independence, Missouri, then the school districts' elections are to be controlled by Section 165.330, RSMo 1949. This statute reads as follows:

"1. The qualified voters of such town, city or consolidated school district shall vote by ballot upon all questions provided by law for submission at the annual school meetings, and such election shall be held on the first Tuesday in April of each year, and at such convenient place or places within the district as the board may designate, beginning at six o'clock a.m. and closing at

seven o'clock p.m. of said day. The board shall appoint three judges of election for each voting place, and said judges shall appoint two clerks; said judges and clerks shall be sworn and the election otherwise conducted in the same manner as the elections for state and county officers and the result thereof certified by the judges and clerks to the secretary of the board of education, who shall record the same, and, by order of said board, shall issue certificates of election to the persons entitled thereto; and the results of all other propositions submitted must be reported to the secretary of the board, and by him duly entered upon the district records.

"2. All propositions submitted at said annual meeting may be voted for upon one and the same ballot, and necessary poll books shall be made out and furnished by the secretary of the board; provided, that in all cities and towns having a population exceeding two thousand and not exceeding seventy-five thousand inhabitants, said elections may at the option of the board be held at the same time and places as the election for municipal officers with the judges and clerks of such municipal election serving as judges and clerks, of said school election, but the ballots for said school election shall be upon separate pieces of paper and deposited in a separate ballot box kept for that purpose.

"3. Should such school district embrace territory not included in the limits of such city or town, the qualified voters thereof may vote at such voting precinct as they would be attached to, provided the ward lines thereof were extended and produced through such adjoining territory; provided, that in any year in which a county superintendent of public schools is to be elected that the qualified voters of such town, city or consolidated district where registration of voters is required, must vote in the ward or precinct of which they are residents, if the place of voting has been so designated by the board of education; provided, that if

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there shall be any other incorporated city or town included in such school district, there shall be at least one polling place within such other incorporated city or town and said school election shall be conducted within the limits of such other incorporated city or town in the same manner as hereinbefore provided for cities or towns having a population exceeding two thousand and not exceeding seventy-five thousand inhabitants.

"4. All school districts in cities, towns and villages in this state which are now or which may hereafter be under special charter shall hereafter hold their annual school elections on the first Tuesday in April, and the members of the boards of education now serving in such districts shall continue to serve until the first Tuesday in April next following the expiration of the terms for which they were elected or appointed, and until their successors are elected and qualified."

Section 165.330, can only be fully understood to cover the problem at hand when read in conjunction with Sections 111.255, 121.010, 121.050, 121.250 and 121.260, RSMo, Cum. Supp. 1957. These statutes are listed to show how they modify Section 165.-330, RSMo 1949.

Section 111.255:

"Notwithstanding any other provisions of law, whenever any primary, general or special elections, or elections held by any school district, fire protection district, sewer district, municipalities, or other political subdivision of the state, are held upon the same day in any political subdivision, one polling place for the several elections in each precinct, consolidated precinct or district in the political subdivision shall whenever feasible be designated by the county clerk, board of election commissioners, or other proper election official, having authority over general elections in the political subdivision and the election officials in the polling places shall be designated by the county clerk, board of election commissioners or other proper election official and

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shall be compensated for one election only.

"Any person failing or refusing to comply with the provisions of this section is guilty of a misdemeanor."

Section 121.010:

"Any election authority may, subject to the provisions of section 121.020, adopt voting machines for use in any or all precincts in which registration is required within its territorial jurisdiction. The voting machines may be used at any or all elections held in such precincts for voting, registering and counting the votes cast."

Section 121.050:

"All costs in connection with voting machines, other than for purchase price or rental charge, shall be apportioned and paid in the same manner as other election expenses are apportioned and paid."

Section 121.250:

"All of the election laws now in force, and not inconsistent with the provisions of this chapter, shall apply with full force and effect to elections in cities and counties using voting machines. Nothing in this chapter shall be construed as prohibiting the use of a separate ballot for constitutional amendments and other public measures."

Section 121.260:

"1. The provisions of all state laws relating to elections and of any city charter or ordinance not inconsistent with this chapter shall apply to all elections in districts or precincts where voting machines are used.

"2. Any provision of law, or of any city charter, or ordinance, which conflicts with the use of voting machines set forth in this chapter, shall not apply to the districts, wards, or precincts in which voting machines

are used. All acts, or parts of acts, or city charters, or ordinances, in conflict with any of the provisions of this chapter, are of no force or effect in election districts, wards or precincts where voting machines are used. (Emphasis added.)

When these statutes are read as a unit it should appear that regardless of the fact that Sections 165.315 and 165.467 had no application to the election held on April 5, 1960, this election was held under valid statutory authorization and was conducted in a sanctioned method. There remains, however, the original question concerning the division of election expenses between the city and the school district.

There is little, if any, real guidance to be had in this area by attempting to harmonize those statutory provisions providing for the allocation of election expenses in Jackson County, St. Louis County, Kansas City and St. Louis. Each statute is designed to take care of a specific problem at a specific geographical location and are not subject to generalization. The Legislature's intention, concerning the problem of dividing election expenses between school districts and cities or counties, might be revealed by observing Section 165.465, RSMo Cum. Supp. 1957. This section relates to school districts with larger populations than No. 30, in Independence, but expresses the view that the school district pays only the additional cost of the election. Section 165.465 reads as follows:

"In any school district having a population of more than two hundred thousand and less than seven hundred thousand, the boards of election commissioners of the city or county or both in which the district is located shall conduct any or all school elections held in the district. When any such school election is held it shall be conducted in all respects in accordance with the laws relating to election of state, county or city officers and to the applicable law relating to the submission of bond issues within the jurisdiction of the board of election commissioners which conducts the election. The cost of the election, if only school issues are submitted, shall be paid by the school district; but when the school election is held at the same time and place as elections for city or county officers, only the additional cost incurred in connection with the printing

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required by the school election shall be paid
by the school district." (Emphasis added.)

To support the theory that the above statute is a reflection of the Legislature's intent when it provides for voting machines to be used for a joint city and school district election, it is to be noted that the original election provisions which were applicable to our situation provided for separate ballots, ballot boxes, poll books, and voters certificates. This additional election equipment was necessary for the school board election and was to be paid for by the school board. It should be emphasized that the school board paid only for the additional supplies and equipment and did not pay for any expenses normally associated with the election. Thus, it is submitted that the school board is only responsible for those expenses which are over and above the normal election expenses paid by the city when a city and school board election are jointly held. This additional cost might very well be limited to that expense of printing sample ballots and placing the candidates' names and the propositions to be voted upon in the different voting machines.

CONCLUSION

Whenever a school district, located primarily but not wholly, within a third class city holds its annual election in conjunction with the city's annual election, the school board shall be responsible for those election expenses which are in addition to the election expenses normally expended by the city for an election.

Yours very truly,

JOHN M. DALTON
Attorney General

EGB/ar/mlw

TAX/TION: In the event of an invalid tax sale, a county would not
TAX SALE: be obligated or liable for any amounts in excess of a
COUNTIES: refund of the purchase moneys plus interest.

January 7, 1960



Hon. James L. Paul
Prosecuting Attorney
McDonald County
Pineville, Missouri

Dear Mr. Paul:

Reference is made to your request for an official opinion,
which request reads as follows:

"A question has arisen relative to a tax sale held in this county in August of 1957 as to what position the county is in and to whom, if anyone, it is liable, and I would appreciate an opinion on the question herein submitted as soon as possible.

"The facts covering this situation are as follows:

(1) In 1947 the following description was conveyed out of a tract of land containing 75 acres to Minnie M. Collingsworth:

Beginning 180 feet West and 450 feet South 6 deg. from the NE corner SE 1/4 NE 1/4 of Section 34, Twp. 21, Range 33, on West line of Highway U. S. 71, thence South 6 Deg. East 100 feet, thence West 338 feet, thence North 4 deg. West 100 feet, thence East 335 feet to place of beg, containing 75/100 acre more or less.

This was carried on the assessment book as a part of the SE 1/4 NE 1/4 of Section 34, Twp. 21, Range 33, containing .75 acre.

(2) In October of 1951, Minnie M. Collingsworth conveyed to O. G. Rhoten the same

Hon. James L. Paul

description contained in paragraph (1) above and later in October of 1951, O. G. Rhoten conveyed the same description to George G. Wiley.

(3) In 1952, the Assessor continued the assessment as outlined in paragraph (1) above in the name of M. Collingsworth and picked up the complete description conveyed as fully set forth in paragraph (1) to George G. Wiley, but assessed it in Section 35, Twp. 21, Range 33.

(4) Mr. Wiley has paid the taxes assessed in his name each year thereafter but following their conveyance in 1951, Collingsworth, of course, did not pay taxes on the assessment in Section 34.

(5) In 1957, the Collector advertised for sale for delinquent taxes as follows:

'M. Collingsworth, .75 acres, Part of the SE 1/4 NE 1/4 Section 34, Twp. 21, Range 33', following thereafter the total interest, tax and costs for taxes for the years 1956, 1955, 1954, 1953 and 1952.

"On Monday, August 26, 1957, this property was purchased by a Mr. John J. Riddel and the 1957 taxes were paid by Mr. Riddel that year.

(6) In 1958, Mr. Riddel assigned his Certificate of Purchase to Mr. Perry O. Trotter and taxes for the year 1958 were paid by Mr. Trotter.

(7) On the 22nd day of September, 1959, which was more than two years after the tax sale, Mr. Trotter presented his Certificate and received a Collector's Deed.

"Now the question that presents itself is this: Obviously and without question, there

Hon. James L. Paul

has been a duplicate or dual assessment on the same property, one carried on the books in Section 34 and the other carried on the books in Section 35. The county has received taxes from both parties. Although there has not been any law suits filed, there has been a demand made by Mr. Trotter that in the event Mr. Wiley institutes a suit to set aside the Collector's Deed, that he in turn intends to sue to recover the amount paid by him to Mr. Riddel for the Certificate plus reimbursement of all taxes paid by him plus interest, the cost of obtaining an abstract of title to the property and any court costs incurred incident to any suit.

"Of course, Mr. Wiley's position is that he has paid taxes on his home which he thought had been properly assessed and intends to try to recover any costs or expenses necessary to clear this matter up.

"Please furnish an opinion covering the county's position and/or liability, if any, in this matter."

We will assume (without deciding) for the purpose of this opinion, that the tax sale referred to is "invalid." This is necessary since if the sale was a valid sale there could exist no question concerning the liability of the county.

In an opinion of this office written to Edward C. Westhouse under date of April 25, 1958, it was held that where the sale and conveyance of land for taxes was invalid because the taxes on said land had in fact been paid, the county was only liable for a refund of the money paid by the purchaser at the tax sale plus interest, citing Section 140.530, RSMo 1949. It was further held in said opinion that the county does not warrant and defend title in a suit brought by the owner of the property sold at tax sale. A copy of said opinion is enclosed herewith for your information.

We also note the general rule as set forth in 51 Am. Jur., Section 1141, page 982, to the effect that in the absence of any legislative enactment to the contrary the doctrine of caveat emptor

Hon. James L. Paul

applies against purchasers at tax sales in favor of the county or other taxing authority. In other words, insofar as the county or other taxing authority is concerned, the purchaser assumes the risk of all irregularities and illegalities in the proceedings for sale.

We have made a further study of the pertinent statutes and do not find any liability placed upon the county in the event of an invalid tax sale except as to a refund of purchase money plus interest as more fully provided under the circumstances set forth in Sections 140.530 and 140.540, RSMo 1949. (Section 140.540, RSMo 1949, would appear to be inapplicable to the circumstances which you had enumerated since it appears that said section applies only where the invalidity was discovered prior to conveyance whereas you state a conveyance has been executed.)

It would seem to us that when the legislature has undertaken to provide for certain obligations of the county in the event of an invalid sale (Sections 140.530 and 140.540, supra) that the same would have the effect of negating any further obligations or liability on the part of the county and we so hold.

CONCLUSION

Therefore, in the premises, we are of the opinion that under the facts which you have outlined, the liability of the county would extend only to a possible refund of purchase money plus interest under the provisions of Section 140.530, RSMo 1949, and that in no event would the county as such be obligated or responsible in any further or greater amount than is provided for in said section.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Donal D. Guffey.

Yours very truly,

JOHN M. DALTON
Attorney General

DDG/mlw
Enclosure

PUBLIC OFFICERS:
RECORDER OF DEEDS:
FEES AND SALARIES:
COMPENSATION:

The fee provided by Section 59.490, V.A.M.S., for adding names to the alphabetical list and furnishing certified copies of veterans' discharges may be retained by the recorder of deeds as unaccountable fees and is not to be considered in determining the maximum amount which the recorder may retain set forth in Section 59.250, V.A.M.S.

October 13, 1960

#190

Mr. Donald J. Parker
Recorder of Deeds
Dunklin County
Kennett, Missouri



Dear Mr. Parker:

We have received your letter of May 17, 1960, in which you requested an opinion of this office regarding Section 59.490, V.A.M.S.

For sake of brevity, we have paraphrased the question you asked so as to read as follows:

Are the fees provided by Section 59.490 V.A.M.S., to be retained by the recorder of deeds in counties of the third class wherein there is a separate circuit clerk and recorder as unaccountable fees, or must they be included as a part of the maximum amount which the recorder may retain under the provisions of Section 59.250, V.A.M.S.?

Section 59.490, supra, originated in House Bill No. 772 of the 63rd General Assembly. As originally enacted, it was applicable to third class counties wherein the circuit clerk and recorder of deeds were separate offices. It provided in part that:

"* * * For each name which the recorder shall append to the aforesaid alphabetical list, and for each certified copy of such discharge as he shall furnish, the recorder shall receive the sum of fifty cents, to be paid out of the county treasury, which fees shall not be deemed to be accountable fees in determining the maximum amount which the recorder may retain as set forth in Section 59.250; * * *"

Mr. Donald J. Parker:

A portion of Senate Bill No. 70, 70th General Assembly, repealed Sections 52.490 and 59.500, RSMo 1949, and Section 59.505, RSMo Cum. Supp. 1957, and enacted a new section, 59.490, wherein the provisions of former Sections 59.490, 59.500 and 59.505 were combined into a single section to be applied in all counties to which the former three sections had applied.

Section 59.490, as found in Senate Bill No. 70, reads as follows:

"1. The recorder in counties of the third class and the circuit clerk and recorder in counties of the third and fourth classes wherein the offices have been combined, as the recorder of the county, shall prepare and keep a separate alphabetical list of the names of all residents of the county who have been discharged from the armed forces of the United States. The list shall show the veteran's name, post office address, and the branch of service from which he was discharged, the date of his discharge and the date of the recording of same, together with the book and page wherein the discharge is recorded. The list shall be maintained by the recorder for public inspection and shall be up to date at all times; and in addition thereto, the recorders shall furnish to all persons who have reported their discharge from the armed forces of the United States one certified copy of the discharge upon request of the veteran, or if the veteran has deceased since the recording thereof, then by his heir, executor or administrator. A veteran is deemed a resident of the county for the purposes of this section if he resided in the county prior to his induction into the armed forces, and returned there upon his discharge, or if he has resided in the county for more than ninety days next prior to the recording of the discharge with the intention of making the county his domicile.

"2. For each name which the recorder or ex officio recorder appends to the alphabetical list, and for each certified copy of the

Mr. Donald J. Parker

discharge that he furnishes, he shall receive the sum of fifty cents, to be paid out of the county treasury. The fees shall not be deemed to be accountable fees in determining the maximum amount which the recorder may retain as set forth in section 59.250 and shall not be deemed to be accountable fees within the meaning of section 59.260." (Emphasis ours)

It is to be noted that, except for minor grammatical changes, numbered paragraph 2 of the present Section 59.490, which relates to fees, is identical to the fee provision contained in said section when it was enacted originally in 1945.

Section 59.250, V.A.M.S., was enacted in its present form in 1953. It reads as follows:

"1. The recorder of deeds in counties of the third class, wherein there is a separate circuit clerk and recorder, shall keep a full, true and faithful account of all fees of every kind received. He shall make a report thereof each year to the county court.

"2. All other fees over and above the sum of four thousand seven hundred fifty dollars for each year of his official term, seven hundred fifty dollars of which shall be compensation for the performance of duties imposed by section 59.365 and four thousand dollars for other duties imposed by law, shall be paid into the county treasury after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary."

On the surface Sections 59.250 and 59.490, supra, appear to be repugnant inasmuch as one (Section 59.250) provides that all fees over and above \$4,750, after payment of certain expenses, shall be paid into the county treasury, whereas the other section (59.490) provides that a specific fee shall not be included as a part of the \$4,750 which the recorder is entitled to retain as compensation.

It is a well established rule of construction that where two statutes relate to the same subject, they must be read together, and provisions of the one having a special application to a particular subject will be deemed to be a disqualification of, or an exception to, the other act which is general in its terms. *Dalton v. Fabius River Drain*. Dist, 219 SW2d 289; *Fleming v. Moore Bros*

Mr. Donald J. Parker

Realty Co., 251 SW2d 8; Lazonby v Smithey, 131 SW 708; Eagleton v. Murphy, 156 SW2d 960. This is true regardless of the date when the general statute was enacted. U.S. v. Hess, 70 F2d 142, rehearing den. 71 F2d 78; State ex rel. Equality Savings and Build. Assn. v. Brown, 68 SW2d 55.

It is our opinion that Section 59.250, supra, which relates to the subject of fees in general, is a general statute, and that Section 59.490, supra, is a special statute dealing with specific fees derived from a specific source. Since Section 59.490, supra, is a special statute, then, under the rule set out hereinabove, it prevails over Section 59.250, supra, and by its provisions the recorder of deeds in a third class county (wherein the recorder of deeds and circuit clerk are separate offices) is entitled to retain the fees he receives for adding names to the alphabetical list and furnishing certified copies of veterans' discharges; and these fees are not to be considered in determining the maximum amount which the recorder may retain as set forth in Section 59.250.

CONCLUSION

Therefore, it is the opinion of this department that the fee provided by Section 59.490, V.A.M.S., for adding names to the alphabetical list and furnishing certified copies of veterans' discharges, may be retained by the recorder of deeds as unaccountable fees and is not to be considered in determining the maximum amount which the recorder may retain set forth in Section 59.250, V.A.M.S.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Calvin K. Hamilton.

Yours very truly,

JOHN M. DALTON
Attorney General

NEPOTISM:
LIBRARIES:
COUNTY SUPERINTENDENTS
OF SCHOOLS:
COUNTY LIBRARY DISTRICT:
OFFICERS:

Section 182.050, RSMo, forbidding employment of relatives of trustee by county library board of trustees or librarian is applicable to relatives of county superintendent of schools, an ex officio member of the board of trustees.

November 17, 1960

Honorable James L. Paul
Prosecuting Attorney
McDonald County
Pineville, Missouri

69

Dear Mr. Paul:

The original of your letter of September 24, 1960, requesting an opinion from this office apparently was never received, but we now have before us a copy of the letter, which reads as follows:

"Will you please furnish this office as soon as possible with an opinion interpreting the provisions of Section 182.050 of the Revised Statutes of the State of Missouri as amended by the laws of 1955 as to whether the law of nepotism as defined in said section applies to a relative of the County Superintendent of Schools who is by said section made a mandatory member of the County Library District.

"It would appear to this office that the intent of the Legislature would be that the law of nepotism would apply to the appointed members but not to the mandatory ex officio member."

Section 182.050, RSMo, mentioned in your letter, reads as follows:

"For the purpose of carrying into effect sections 182.010 to 182.120, in case a county library district is

Honorable James L. Paul

established and a free county library authorized as provided in section 182.010, within sixty days after the establishment of the county library district, there shall be created a county library board of trustees, which shall consist of the county superintendent of schools, and four other members, none of whom shall be elected county officials. The members shall be appointed by the county court for terms of four years each, except that as to the members of the first board, one shall be appointed for one year, and one each shall be appointed for two years, three years, and four years, respectively, from the first day of July following their appointment; and annually thereafter before the first day of July the county court shall appoint successors. Vacancies in the board occasioned by removals, resignations or otherwise shall be reported to the county court and shall be filled in like manner as original appointments; except that if the vacancy is an unexpired term, the appointment shall be made for only the unexpired portion of that term. No member of the board shall receive compensation as such. No person shall be employed by the board of library trustees or by the librarian who is related within the third degree by blood or by marriage to any trustee of the board." (Underscoring supplied.)

The pertinent statutory provision, underscored above, does not distinguish between the county superintendent of schools, who is an ex officio member of the county library board of trustees, and the other members of the board; and, in fact, it uses the explicit language, "any trustee." This provision is clear and unambiguous, and there appears to us to be no basis, under accepted rules of statutory construction, for construing it in any manner other than exactly as it reads. Hence, we believe that it must be construed

Honorable James L. Paul

to apply to the employment of relatives of the county superintendent of schools.

CONCLUSION

It is the opinion of this office that Section 182.050, RSMo, forbidding employment of relatives of a trustee by a county library board of trustees or librarian is applicable to relatives of a county superintendent of schools, an ex officio member of the board of trustees.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Baumann.

Very truly yours,

John M. Dalton
Attorney General

JCB:lc

COUNTIES: If county budget for Class 3, provided for in Section 50.680, RSMo 1949, is not sufficient to take care of unforeseen expense in that fund, the county court may use money in Class 6 to defray such expenses if Class 6 contains a sufficient sum not subject to restrictions mentioned in said statute.

December 7, 1960



Honorable W. H. Pinnell
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Mr. Pinnell:

This opinion is rendered in reply to your inquiry reading in part as follows:

"May the County Court issue warrants for bridges or roads out of the general revenue account of the county. Assuming that such warrants cannot be issued out of the general revenue funds, are the County Clerk or the County Treasurer liable on their bonds if the County Clerk signs the warrants, or in the case of the County Treasurer, cash such warrants."

Your request involves a construction of Section 50.680, RSMo, 1949, which provides:

"The court shall classify proposed expenditures in the following order:

"Class 1. The county court shall set aside and apportion a sufficient sum to care for insane pauper patients in state hospitals. Class one shall be the first obligation against the county and shall have priority of payment over all other classes.

"Class 2. Next, the county court shall set aside a sum sufficient to pay the cost of elections and the cost of holding circuit court in the county where such expense is made chargeable by law against the county except where such expense is provided for in some other classification by this law. This shall constitute the second obligation of the county and all proper claims coming under this class shall have priority of payment over all except class one. In estimating the amount required in class two the county court shall set aside and apportion in the budget a sum not less for even years than the sum actually expended in the last even numbered year and for odd years an amount not less than the amount that was actually expended during the last preceding odd numbered year.

"Class 3. The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or construction of bridges and roads on other than state highways (and not in any special road district). The funds set aside and apportioned in this class shall be made from the anticipated revenue to be derived from the levies made under Section 137.555, RSMo 1949. This shall constitute the third obligation of the county.

"Class 4. The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendable nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six.

"Class 5. The county court shall next set aside a fund for the contingent and emergency expense of the county, the court may transfer any surplus

funds from classes one, two, three, four to class five to be used as contingent and emergency expense. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service, (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes.

"Class 6. After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose; provided, however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six; provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class six."

The purpose and scope of Class 6 is best reflected in the following language from State ex rel. Strong v. Cribb, 364 Mo. 1122, 1.c. 1128, 273 S.W. (2d) 246:

"It is common knowledge that unforeseen events often occur which require expenditures in excess of the amount assigned to a certain class such as Class 3, the bridge and road fund. If the budget for such class is not sufficient to take care of the unforeseen expense, the county court may use money in Class 6, provided there is a sufficient sum in that class that is not subject to the restrictions mentioned in the statute * * * The object of the constitutional provision, Sec. 26 (a) of Article VI, and the 'County Budget Laws,' supra, is to compel counties and municipalities to operate on a cash basis. In other words, the governing body may not obligate the county or municipality in a sum in excess of the revenue provided for any one year. The sum available to be spent in any one year is the revenue provided for that year 'plus any unencumbered balances from previous years.' Sec. 26 (a), supra."

Based on quoted language above from State ex rel. Strong v. Cribb, an affirmative answer is here given to your first question,

Honorable W. H. Pinnell

and in the light of such answer your additional question becomes moot.

CONCLUSION

It is the opinion of this office that if the county budget for Class 3, the bridge and road fund, provided for in Section 50.680 RSMo 1949, is not sufficient to take care of unforeseen expense in that fund, the county court may use money in Class 6 to defray such unforeseen expense so long as there remains in Class 6 a sufficient sum that is not subject to restrictions mentioned in said statute.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M;ms

LIBRARIES:
MERGER:
CITY AND COUNTY TAXES:
TAX RATES NOT REQUIRED
TO BE EQUALIZED:

When city library district with tax rate of 1/2 mill, and county library district, with rate of one mill, are to be merged under provisions of Section 182.040, RS Mo Cum. Supp., 1957, equalization of tax rates before districts can be merged is not required.

January 13, 1960



Honorable Paxton P. Price
State Librarian
State Office Building
Jefferson City, Missouri

Dear Mr. Price:

This is to acknowledge receipt of your recent request for a legal opinion which reads as follows:

"Can a city having a library established and maintained under the library laws of the state, and further, being supported by a library tax rate of one-half(1/2) mill, become a part of a county library district, having a one(1) mill tax rate, under the provisions of section 182.040, R.S. Mo., 1957 Suppl., without first having to equalize its tax rate with that of the county library district to be joined?"

Section 182.040, RSMo 1949, contained the statutory procedure to be followed when a city library district became a part of a county library district prior to enactment of such section(Laws 1955, page 547) and said section read as follows:

"1. After the establishment of a free county library, the board of trustees, common council or other legislative body of any incorporated city or town in the county now or hereafter maintaining a free county library as above mentioned, may after approval of such proposed change by the directors of said free county library, notify the county court that such city or town desires to become a part of the free county library system at the beginning of the next succeeding full fiscal year; and thereafter such city or town shall be a part thereof, and the inhabitants shall be entitled to the benefits of such free county library and the property within

Honorable Paxton P. Price

such city or town shall be liable to taxes levied for free county library purposes; provided, the board of trustees, common council or other legislative body of such city or town, as the case may be, may petition the county court and in all other respects proceedings shall be had, as near as may be, as set forth in section 182.010, and the same rate of tax is had in such city or town as under the free county library system in such county.

"2. The board of trustees, common council or other legislative body, in any such incorporated city or town in a county having made provision for becoming a part of the free county library system as in section 182.010, and in this section provided, may at any time notify the county court that such city or town no longer desires to be a part of the free county library system, and such city or town shall, with the close of the next succeeding full fiscal year, cease to be a part of the free county library system, and the property situated in such city or town shall not thereafter be liable to taxes for free county library purposes; provided, that the board of trustees, common council, or other legislative body of the city or town, as the case may be, shall petition the county court and otherwise like proceedings shall be had, as near as may be, as in the case of becoming a part of the free county library system, and a majority vote is cast accordingly." (Underscoring ours.)

In an opinion of this department written for you on October 15, 1953, among other matters, it was concluded that the underscored proviso of the above quoted section meant there could not be a merger between a city and a county library district unless the tax rates of each district were the same at the time of the merger, consequently, a city library district with a tax rate of only one-half that of a county library district, with which the city district proposed to merge, could not be merged until the city tax rate had first been equalized with that of the county district.

The opinion correctly stated the law at the time it was written, however, it does not now answer the inquiry for the reason the law quoted in said opinion has since been changed by the 68th General Assembly. Section 182.040, RSMo 1949, and other sections of the

Honorable Paxton P. Price

same chapter were repealed by Laws of 1955, page 547. What is now Section 182.040, RSMo Cum. Supp., 1957, was enacted in lieu of Section 182.040, RSMo 1949. Now, Section 182.040 reads as follows:

"After the establishment of a free county library district the legislative body of any incorporated city, town or village in the county which was excluded from the county library district because of the maintenance of a tax supported municipal library established and maintained pursuant to other provisions of this chapter, after approval of the proposed change by the trustees of the free county library district, may become a part of the free county library district by notifying the county court that the municipality desires to become a part of the free county library district at the beginning of the next succeeding full fiscal year; and thereafter the municipality shall be liable for taxes levied for free county library purposes at the same rate as is levied for the free county library district in such county."

Upon comparing new Section 182.040 with former Section 182.040, it is readily seen there have been changes in the latter. The only change with which we are concerned here is with reference to the proviso of former Section 182.040, mentioned above. Said proviso is not found in present Section 182.040, and there are no provisions in said section as were found in the proviso of the former section. Present Section 182.040 does not require a city library district to have the same tax rate as a county library district with which it proposes to merge, nor does the section provide that a city library district with a lesser tax rate than a county library district must first equalize its tax rate with the county tax rate before the two districts can be merged.

In the absence of any such provision of Section 182.040, RSMo Cum. Supp., 1957, the rate of a city library district merging with a county library district is not required to be equalized at the rate of the latter district prior to the merger. The procedure for merger under said section was discussed in our opinion of this department, written for Honorable Charles E. Hansen, prosecuting attorney of Franklin County, on June 18, 1959. A copy of this opinion is enclosed for your consideration.

Honorable Paxton P. Price

After the merger has been effected the municipality shall be liable for taxes levied for free county library purposes at the same rate as that levied for the free county library district.

In view of the foregoing, our answer to your inquiry is in the negative.

Conclusion

Therefore, it is the opinion of this department that when a city library district, with a tax rate of one-half mill, and a county library district, with a tax rate of one mill, are to be merged under the procedure authorized by Section 182.040, RSMo Cum. Supp., 1957, the provision of said section does not require the tax rate of the city district to be first equalized with the rate of the county district before such districts can be merged.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Paul N. Chitwood.

Yours very truly,

John M. Dalton
Attorney General

Enc.
PNC:rw

COUNTY HOSPITALS:

The hospital board of trustees does not have the authority to spend accumulated money in the hospital fund for a promotion or advertising campaign preceding a bond election to enlarge the public hospital.

April 20, 1960



Hon. Charles A. Powell, Jr.
Prosecuting Attorney
Macon County
Macon, Missouri

Dear Mr. Powell:

Reference is made to your request for an official opinion, which request reads as follows:

"I have the opinion of your Mr. Noblet, number 33-57 dated Feb. 28, 1957 relative to the right of the County Court to pay from general revenue funds for advertising or promotion preceding bond election to enlarge hospital, which opinion is that no such authority is in the Court.

"The Hospital board of Trustees has asked me to inquire for an opinion relative to their authority to spend accumulated money in the hospital funds for such promotion or advertising campaign preceding such bond election."

Section 205.160, RSMo 1949, authorizes the county court, subject to the provisions of Sections 205.160 to 205.340, to establish, construct, equip, improve, extend, repair and maintain a public hospital and further authorizes the county court to issue bonds therefor as authorized by the general law governing the incurring of indebtedness by counties.

Section 205.170, RSMo 1949, provides for a board of hospital trustees and Section 205.180, RSMo 1949, provides for the election of said hospital trustees.

Section 205.190 prescribes certain powers and duties of said hospital trustees. Said section specifically provides that

Hon. Charles A. Powell, Jr.

the board of trustees shall have the exclusive control of the expenditure of all moneys collected to the credit of the hospital fund. Section 205.200, RSMo Cum. Supp. 1957, authorizes an annual levy for the maintenance and improvement of a county hospital and more fully provides as follows:

"Except in counties operating under the charter form of government, the county court in any county wherein a public hospital shall have been established as provided in sections 205.160 to 205.340, shall levy annually a rate of taxation on all property subject to its taxing powers in excess of the rates levied for other county purposes to defray the amount required for the maintenance and improvement of such public hospital, as certified to it by the board of trustees of the hospital; the tax levied for such purpose shall not be in excess of twenty cents on the one hundred dollars assessed valuation. The funds arising from the tax levied for such purpose shall be used for the purpose for which the tax was levied and none other."

It is, of course, a fundamental rule of law that any public official or official body has only such authority as is expressly given by the Constitution and statutes or as must of necessity be implied to carry out the express powers and none other.

We have fully examined the above statutory provisions, together with other statutes relating to county hospitals and the powers and duties of the hospital trustees, and do not find any provision which in our opinion would authorize the expenditure of hospital funds for a promotion or advertising campaign preceding a bond election to raise money to enlarge the county hospital. Absent such authority, we must conclude that the county hospital trustees do not have the authority to expend accumulated money in the hospital fund for the promotion or advertising campaign preceding a bond election.

Support for this conclusion is found, we believe, in the last sentence of Section 205.200, supra, which states that, "The funds arising from the tax levied for such purpose shall be used for the purpose for which the tax was levied and none

Hon. Charles A. Powell, Jr.

other." Insofar as the accumulated funds to which you refer might exist because of a prior bond issue, we think that they could not be used for the purposes stated in view of our previous opinion to William E. Gladden, Prosecuting Attorney of Texas County, issued under date of February 28, 1957. You state in your letter that you have a copy of the Gladden opinion.

CONCLUSION.

Therefore, in the premises, it is the opinion of this office that the hospital board of trustees does not have the authority to spend accumulated money in the hospital fund for a promotion or advertising campaign preceding a bond election to enlarge the public hospital.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Donal D. Guffey.

Very truly yours,

JOHN M. DALTON
Attorney General

DDG:mc

CITY OFFICERS
ASSISTANT CITY MARSHAL:

An assistant city marshal of a third class city is prohibited by law from selling the city in which he is assistant marshal, a motor vehicle because of the fact that he is a city officer.

December 8, 1960



Mr. Charles A. Powell, Jr.
Prosecuting Attorney
Macon, Missouri

Dear Sir:

On November 15, 1960, you wrote to this department requesting an official opinion, which opinion request reads:

"I have been requested by a councilman of this city to inquire whether it is illegal for an assistant city marshal to sell the city a used truck.

"His appointment to his job is for a year and his pay is on a yearly basis.

"I indicated my belief that the reason for the rule would not apparently have much application in such case, but that if he is within the definition of officer, in duration of his job and pay period, the prohibition would extend to him.

"I am advised the city attorney indicated the propriety of this transaction, basing his opinion on his determination that the assistant marshal was not an 'officer.'"

Section 77.470 RSMo reads:

"Officer prohibited from being interested in contracts, etc., how punished. -- If any city officer shall be directly or indirectly interested in any contract under the city, or in any work done by the city, or in furnishing supplies for the city, or any of its institutions, he shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment; and upon the city council, or any member thereof, becoming satisfied

that any officer of the city is so interested, the council shall, as soon as practicable, be convened to hear and determine the same, and, if, upon investigation such officer be found so interested, by a majority of all the members elected to the council, he shall be immediately dismissed from office."

It would appear to be clear that the selling of a motor vehicle to a city would come within the purview of the above section, if the person selling it was a city officer.

Section 77.400 RSMo 1949 reads:

"The term 'officer', whenever used in this chapter shall include any person holding any situation under the city government of any of its departments, with an annual salary, or for a definite term of office.

From the above we see that "officer" is anyone who, among other things, holds a situation under the city government for a definite term of office.

Section 85.551 Laws of 1955, page 290 reads:

"Marshal to be chief of police where department not adopted - assistants and policemen appointed under ordinance -- removal --. 1. In cities of the third class which shall not have adopted the merit system police department provided for in sections 85.541 to 85.571, the marshal shall be the chief of police, and there also may be one assistant marshal, who shall serve for a term of one year and who shall be deputy chief of police; such number of regular policemen as may be deemed necessary by the council for the good government of the city, who shall serve for terms of one year; and such number of special policemen as may be prescribed by ordinance, to serve for such time as may be prescribed by ordinance.

2. The manner of appointing the assistant marshal and all policemen of the city shall be prescribed by ordinance. The council shall also, by ordinance, provide for the removal of any marshal, assistant marshal or policeman guilty of misbehavior in office."

Mr. Charles A. Powell, Jr.
page 3

We have been informed by the City Clerk of your city that Macon does not have the merit system police department. The city is a third class city.

From the above we see that the assistant city marshal does have a definite term of office, which brings him within the purview of Section 77.400, supra, thereby making him a city officer and so within the purview of Section 77.470 supra.

CONCLUSION

It is the opinion of this department that an assistant city marshal of a third class city which does not have a merit system police department, is prohibited by law from selling the city in which he is assistant marshal, a motor vehicle, because of the fact he is a city officer.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

HPW:ms

JURY:
JURY FEES:
COUNTIES:

In civil cases wherein a change of venue has been granted the county to which the venue has been changed is liable for duly authorized jury fees over and above the amounts which are taxed as costs and collected from the unsuccessful party.

October 10, 1960



Honorable James T. Riley
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion, which request reads as follows:

"Section 494.160 provides that the cost of a jury shall be taxed against the unsuccessful party and collected as costs the sum of twelve dollars. The balance of the jury costs is paid by the county.

"In cases of change of venue from another county in a criminal case, the statutes provide that the court costs be paid by the county in which the indictment was originally filed.

"Will you please advise if in a civil case the county in which the suit was originally instituted is liable for the jury fees over and above that which is collected from the unsuccessful party."

Section 494.100, RSMo, C.S. 1957, provides that each petit juror on the regular panel shall receive a specified amount for each day's service and mileage, "to be paid out of the county treasury."

Honorable James T. Riley

Section 494.110, RSMo, C.S. 1957, provides that petit jurors not on the regular panel shall receive for their services the amount specified in Section 494.100, which shall be paid as provided in said section. This section formerly provided that such payment was to be made as provided in Section 494.140.

Section 494.130, RSMo 1949, provides that the "clerk of the court" shall keep a book in which he shall enter, upon application of each juror, his time of service, mileage, etc.

Section 494.140, RSMo 1949, provides that the clerk shall issue to the juror a scrip showing the amount which such juror is entitled to receive out of the county treasury.

Section 494.150, RSMo 1949, provides that the treasurer of the county, upon presentation of such scrip, is required to pay the same out of any money in the treasury appropriated for county expenses, and such scrip shall be received by the sheriff, collector and other proper officers in payment of any debt due the county.

Section 494.160, RSMo 1949, does, as you have noted, provide that in a jury trial of any case, other than criminal, there shall be taxed against the unsuccessful party and collected as costs the sum of twelve dollars as jury fees.

Considering the above statutory provisions, the court, in the case of Scott v. Young, 113 Mo. App. 46, held that the county pays the jury expenses in the circuit court. The court further stated, l.c. 51, that the fees which are taxed as costs and collected from the unsuccessful party, as provided by Section 494.160, "are to be paid into the county treasury by way of reimbursing the treasury for moneys paid out by it theretofore in payment of the jury service in that particular case."

We believe that it is clear from a reading of the above sections that the jury fees are to be paid from the county treasury of the county in which the trial is held. Nothing in these sections imposes the obligation for such fees and expenses upon the county in which the suit was originally instituted.

Further, we have fully examined the statutory provisions relating to change of venue in civil cases and do not find any statutory provision which would impose the obligation for the payment of jury fees upon the county wherein the suit was originally instituted. It is, of course, fundamental that the

Honorable James T. Riley

county is not obligated for fees and expenses of this nature unless so chargeable by statute. Henry County v. St. Clair County 81 Mo. 72. The entire subject of costs is a matter of statutory enactment. State v. Ball, 158 SW2d 182.

In passing, we note with interest the case of Berry v. St. Francois County, 9 Mo. 361, wherein the court stated:

" * * * When a cause is removed from one county to another, by a change of venue, it is as much a cause of the county to which it is removed (so far as the present question is involved), as if the indictment had been found in it; and there is as much justice and propriety in making the latter county pay the expense of a guard as if the offense had been committed within its limits. The county to which a cause is removed today, may in its turn tomorrow send a cause to the county from which one has been received. * * *"

Sections 550.120 and 550.130 do specifically provide that in any criminal cause in which a change of venue is taken the costs are to be paid by the county in which the indictment was originally found or the proceedings instituted. Such statutes are, we believe, a legislative recognition that, in the absence of such an enactment, the costs for which a county is liable would be borne by the county to which the change of venue was taken, and fully support the conclusion above reached, that in civil cases, in the absence of such a legislative enactment, jury fees are to be paid out of the county treasury of the county in which the trial is had.

CONCLUSION

Therefore, it is the opinion of this office that in civil cases wherein a change of venue has been granted, the county to which the venue has been changed is liable for duly authorized jury fees over and above the amounts which are taxed as costs and collected from the unsuccessful party.

Honorable James T. Riley

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

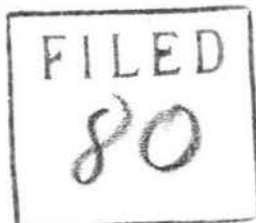
Yours very truly,

John M. Dalton
Attorney General

DDG:vlw

BOARD OF PUBLIC BUILDINGS:
DIRECTOR OF PUBLIC BUILDINGS:
CHIEF OF PLANNING AND
CONSTRUCTION:
PUBLIC BUILDINGS:

Chief of Planning and Construction
is not authorized or directed to
exercise any authority in conjunc-
tion with construction of medium
security penal institution at
Moberly, Missouri.



January 18, 1960

Honorable John W. Schwada
Comptroller and Budget Director
Capitol Building
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion,
which request reads as follows:

"A question has been raised with this office
relative to the supervision of construction
of the Medium Security Institution at
Moberly, and as to the proper authority for
the approval of payments against the appro-
priations for that institution.

"The 68th General Assembly in Extra Session
approved Senate Committee Substitute for
Senate Bill 1, which provided that the Board
of Public Buildings shall 'prepare plans and
specifications and shall proceed to construct
or reconstruct on the site under the general
supervision of the director of public build-
ings and from funds available for such purpose,
a modern, medium security penal institution.'

"The 69th General Assembly, in its 2nd Extra
Session by House Substitute for Senate Bill 3,
established a Planning and Construction Unit
of this Division and authorized the chief of
that unit to supervise construction of certain
types.

"The legal question would seem to be this: In
view of the provisions of the above mentioned
legislation, is the Chief of Planning and Con-
struction required to exercise his duties with

Honorable John W. Schwada

respect to the planning and construction of the Medium Security Institution?

"Since plans for the Moberly facilities are well underway and since it is my understanding that bids for construction will shortly be opened, I would appreciate a prompt reply from you."

The office of Chief of Planning and Construction was created in 1957. The powers and duties pertaining to said office are found in Sections 8.290 to 8.360, V.A.M.S. The principal duties of said office insofar as they pertain to the question here under consideration are found in Section 8.310, V.A.M.S., which section provides as follows:

"The chief of planning and construction shall serve as advisor and consultant to all department heads in obtaining architectural plans, letting contracts, supervising construction, purchase of real estate, inspection and maintenance of buildings. No contracts shall be let for repair, rehabilitation or construction of buildings without approval of the chief of planning and construction, and no claim for repair, construction or rehabilitation projects under contract shall be accepted for payment by the state without approval by the chief of planning and construction; except that after the need for the construction, repair, maintenance or improvement of any building or facility serving a state institution of higher learning has been determined and the proposed construction or improvement has been approved as part of the state's building program by the planning and construction section and has been authorized by the general assembly and the governor through a proper appropriation, the boards of curators of the state university and Lincoln University and the several boards of regents of the state colleges may contract for architectural and engineering services for the design and supervision of the construction, repair, maintenance or improvement of such educational buildings or institutions and may contract for such construction, repair, maintenance or improvement."

The duties to be performed by the Chief of Planning and Construction under the above section are to be exercised

Honorable John W. Schwada

throughout the state, except at the seat of government and except as may otherwise be provided by law. This, for the reason that under the provisions of Section 8.120, V.A.M.S., the duty to contract for and superintend the repair and construction of any public buildings or improvements that are required by law at the seat of government is enjoined upon the Director of Public Buildings.

A medium security institution for the detention, confinement and rehabilitation of prisoners was established by an act of the General Assembly in 1956. See Laws of Missouri, 1955, Extra Session, page 27.

The act creating said institution provided for the creation of a commission to select a proper site, and further provided that, upon selection of the site, the Board of Public Buildings shall prepare plans and specifications and shall proceed to construct or reconstruct on the site, and under the general supervision of the Director of Public Buildings, a medium security penal institution. Said provision reads, in part, as follows (Laws of Mo., 1955, Ex. Sess., pp. 28 and 29):

"Upon the selection of the site for the institution, and the acquisition of the land if necessary, the board of public buildings shall prepare plans and specifications and shall proceed to construct or reconstruct on the site under the general supervision of the director of public buildings and from funds available for such purpose, a modern, medium security penal institution. * * *"

It is abundantly clear from the above provision that it is the duty of the Board of Public Buildings to secure plans and specifications and to construct, under the general supervision of the Director of Public Buildings, a medium security penal institution.

It is a familiar rule of statutory construction that where two laws relate to the same subject they must be read and construed together and provisions of one having special application to a particular subject are to be deemed a qualification of or an exemption to another act general in terms. *Veal v. City of St. Louis*, 365 Mo. 836, 289 SW2d 7.

Sections 8.290 to 8.360, V.A.M.S., relating to the duties of the Chief of Planning and Construction, are general in nature and relate to all construction. The provisions of Senate Committee Substitute for Senate Bill No. 1 of the 68th General

Honorable John W. Schwada

Assembly, Laws of Missouri, 1955, Extra Session, page 27, are special, having application only to the construction of a medium security penal institution. Following the above-referred to rule of statutory construction, the special statute must prevail over the general. We are, therefore, led to the conclusion that the act charging the Board of Public Buildings with the duty of securing plans and specifications and constructing a medium security penal institution is a qualification of or exception to the provisions of Sections 8.290 to 8.360, V.A.M.S., and that the Chief of Planning and Construction is not required to exercise any duties in connection with the planning and construction of the medium security penal institution.

The Board of Public Buildings would be the proper authority to approve payments against the appropriations made for building such institution.

CONCLUSION

It is, therefore, the opinion of this office that the Chief of Planning and Construction is not authorized or directed to exercise any authority in conjunction with the construction of the medium security penal institution at Moberly, Missouri. The Board of Public Buildings is charged with the duty of constructing said medium security penal institution and such work is to be carried on under the general supervision of the Director of Public Buildings.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Donal D. Guffey.

Yours very truly,

JOHN M. DALTON
Attorney General

DDG:mc

ABSENTEE BALLOTS:
LEGAL INHERITANCE:

It is legal to vote an absentee ballot
on July 4th.

July 14, 1960



Honorable William E. Seay
Prosecuting Attorney
Dent County
Salem, Missouri

Dear Mr. Seay:

Your opinion request of June 10, 1960, reads:

"I would like your opinion as to whether it
is legal to vote absentee votes on the 4th
of July."

On August 18, 1954, this department rendered an opinion to the Board of Election Commissioners of the City of St. Louis, a copy of which opinion is enclosed. We believe that this opinion, affords an answer to your question. That opinion, of course, refers only to registration of voters and not to the casting of an absentee ballot. However, on page three of that opinion we quote from the case of Bullock v. Peoples Bank of Holcomb, 173 SW2d 753, which states in part: " * * * The fact that a day is made a holiday by statute does not mean business cannot be transacted on that day, except insofar as that statute or some other imposes such restriction * * *". I do not find anything in the statutes which prohibits the casting of absentee ballots on a holiday. Sections 112.020 through 112.050, RSMo 1949, relate to the application for and the voting of an absentee ballot. We find nothing in any of these sections which would preclude the casting of such a ballot upon a holiday. Therefore, in the absence of such limitation and in view of the opinion of August 18, 1954, we believe that it would be legal to cast an absentee ballot on a legal holiday.

It is the opinion of this department that it is legal to cast an absentee ballot on July 4.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:ar
Enclosure

WATER POLLUTION BOARD:

Industrial waste of sewage or other wastes which emanate from the property of an individual, a partnership or corporation but which do not reach a stream, river, lake or other body of water is not subject to the provisions of Chapter 204, RSMo, Cum. Supp. 1957, and is not, therefore, within the control and purview of the water pollution board.

March 1, 1960



Mr. Jack K. Smith, Executive Secretary
Water Pollution Board
112 West High Street - P. O. Box 154
Jefferson City, Missouri

Dear Sir:

On February 17, 1960, you wrote to this department for an official opinion. Your opinion request reads:

"Each year the Missouri Water Pollution Board receives many complaints regarding discharges of waste from individual residences. These wastes may be septic tank overflow, kitchen sink waste or laundry waste. In most instances, these wastes form pools in roadside ditches or in low areas. Seldom do these wastes directly reach a stream or river. Practically speaking, these wastes would reach a stream or river only during periods of surface runoff and then, of course, the dilution factor would minimize the harmful effect of pollution.

"While the problems of malfunctioning individual sewage disposal are very real and troublesome, we question whether or not they are problems for this Board's action. We, therefore, request an opinion as to whether or not industrial waste or sewage or other waste discharges which emanate from a person's property but do not reach a stream, river, lake or other body of water are subject to the provisions of Chapter 204, Revised Statutes of Missouri, 1949, Cumulative Supplement 1957."

Mr. Jack K. Smith

In regard to this matter we first direct your attention to numbered paragraph (5) of Section 204.010, Missouri Revised Statutes, Cumulative Supplement 1957. This paragraph is a definition of "Pollution," and reads:

"(5) 'Pollution', the discharge or deposit of sewage, industrial waste or other wastes into the waters of the state in such condition, manner or quantity which causes the waters to be contaminated, unclean, impure, odorous or noxious to such an extent as to be detrimental to public health, to create a public nuisance, to kill or have an unreasonably harmful effect upon fish or other aquatic life, or upon game or other wildlife, or unreasonably detrimental to agricultural, industrial, recreational or other reasonable uses;"

From the above it will be seen that "pollution" exists only where contaminated liquid is discharged into or reaches "the waters of the state."

I now direct your attention to numbered paragraph (7) of Section 204.010, supra. This paragraph defines "waters of the state," and reads:

"(7) 'Waters of the state', all rivers, streams, lakes and other bodies of surface or subsurface water lying within or forming a part of the boundaries of the state which are not entirely confined and retained completely upon the property of a single individual, partnership or corporation."

From the above it will be noted that "waters of the state" do not embrace such small and, in most instances no doubt, temporary puddles of water as would result from individual residences.

We believe that such waste does not come within the purview of numbered paragraph (7), supra, for the further reason that in most instances such waste does not get beyond the property of the individual who produces it, but is confined to the property of the individual, partnership or corporation which brings it into being.

Mr. Jack K. Smith

We would further note that to impose upon the water pollution board, with its very limited personnel, the task of policing the hundreds of thousands of individual residences of this state would be a wholly impossible task and certainly was never the intention of the legislature which enacted the water pollution law.

CONCLUSION

It is the opinion of this department that industrial waste of sewage or other wastes which emanate from the property of an individual, a partnership or corporation but which do not reach a stream, river, lake or other body of water is not subject to the provisions of Chapter 204, RSMo, Cum. Supp. 1957, and is not, therefore, within the control and purview of the water pollution board.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:lc,vlw

SUBDISTRICT WATERSHEDS:
COSTS:

Mill tax money which is collected in subdistrict watersheds established under Chapter 278, Missouri Revised Statutes, Cumulative Supplement, 1957,

may be used to pay the cost of advertising for bids and the construction of works of improvement in the watershed development; such tax money may not be used in connection with the election of trustees; administrative costs closely connected with construction of works of improvement may be paid from proceeds of the mill tax; such other items of administrative costs as may not be paid out of such mill tax money, may be paid out of fund of the soil conservation district or districts in which the subdistrict in question is located.

March 21, 1960

Honorable Harold Slusher, Executive Secretary
Missouri State Soil Districts Commission
T-9 Building, University of Missouri
Columbia, Missouri



Dear Mr. Slusher:

Your recent request for an official opinion reads:

"The State Soil Districts Commission would appreciate an official opinion regarding the use of the money levied in subdistrict watersheds established in Missouri under the conservation law, Chapter 278, Revised Statutes, Missouri, 1949. This law is also sometimes referred to as Senate Bill 124, 69th General Assembly, and is an amendment to Senate Bill 80, 62nd General Assembly.

"The question involved is - Can the mill tax money which is collected in subdistricts be used

1. To pay cost of the biannual election of trustees, which election is required by law?
2. To pay cost of advertising for bids in the construction of works of improvement in watershed development?
3. To pay any administrative cost necessary in the operation of a subdistrict of a soil district?

Honorable Harold Slusher

"The State Soil Districts Commission will certainly appreciate your official opinion on this matter since six subdistrict watersheds scattered over the State will be affected in the next two years."

The expenditures necessitated by the imposition of certain duties upon the governing body of a subdistrict watershed, which is the board of soil district supervisors of the soil conservation district in which the subdistrict is formed, are indefinite but obviously substantial.

We now direct attention to numbered paragraphs 1, 2, 3, 4 and 5 of Section 278.250, Missouri Revised Statutes, Cumulative Supplement, 1957, which read:

"1. After the governing body has obtained agreements to carry out recommended soil conservation measures and proper farm plans from owners of not less than sixty-five per cent of the lands situated in the subdistrict, a special annual tax, as provided in subsections 4 and 5 may be imposed, the proceeds of which shall be used for construction, repair, alteration, maintenance and operation of the present and future works of improvement within the boundaries of the subdistrict in order to cost share in funds from federal sources appropriated for watershed protection and flood control.

"2. On or before July tenth of each year the governing body of the subdistrict shall make an estimate of the amount it deems necessary to be raised by such special tax for the ensuing year.

"3. If portions of the subdistrict are in more than one soil district, then the governing body, as hereinbefore designated in such event, after arriving at the estimate in dollars deemed necessary for the entire subdistrict shall ratably apportion such amount between the soil districts.

"4. The board of soil district supervisors of each soil district containing a subdistrict or

Honorable Harold Slusher

a portion thereof shall make the necessary millage levy on the assessed valuation of all real estate within the boundaries of the subdistrict lying within their respective soil district to raise the needed amounts, but in no event shall the levy exceed four mills and, on or before the first day of September of each year, shall certify the rate of levy to the county court of the county within which the district is located with directions that at the time and in the manner required by law for the levy of taxes for county purposes the county court shall levy a tax at the rate so fixed and determined upon the assessed valuation of all the taxable property within the subdistrict, in addition to such other taxes as are levied by the county court.

"5. The body having authority to levy taxes within the county shall levy the taxes provided in this law, and all officials charged with the duty of collecting taxes shall collect the taxes at the time in the form and manner and with like interest and penalties as other taxes are collected; and when collected shall pay the same to the district ordering its levy and collection or entitled to the same, and the payment of such collections shall be made monthly to the treasurer of the soil district. The proceeds shall be kept in a separate account by the treasurer of the soil district and identified by the official name of the subdistrict in which the levy was made. Expenditures from the fund shall be made on requisition of the chairman and secretary of the governing body of the subdistrict."

It will be noted that numbered paragraph 1 of the above provides for the manner in which the tax money which is raised shall be used, and that those provisions are "for construction, repair, alteration, maintenance and operation of the present and future works of improvements within the boundaries of the subdistrict"

Honorable Harold Slusher

No other provision is to be found in the law governing this matter other than in numbered paragraph 2 of Section 278.240, which provides that three persons living within the subdistrict shall be elected to serve as trustees to the governing body of the subdistrict and that "The trustees shall be reimbursed for any expenses incurred in the attendance of meetings of the governing body of the subdistrict."

The problem which lies before us, therefore, is whether the costs of the operations set forth by you in paragraphs 1, 2, and 3 of your letter are provided for in the permissible expenditures set forth in numbered paragraph 1 of Section 278.250, supra.

We believe it may reasonably be said that the cost set forth in paragraph 2, which is to pay costs of advertising for bids in the construction of works of improvement in watershed development, might well come within the proviso of "construction of present and future works of improvement", since the advertising for bids is a necessary prerequisite to such construction. However, the costs set forth by you in 1, to wit, to pay cost of the biannual election of trustees, could only be said to come within the purview of numbered paragraph 1 of Section 278.250, supra, by a most tenuous and remote inference, if at all. Perhaps there would be some items of administrative cost which might be so directly and intimately related to construction of works of improvement as to properly be classified as construction costs so that their payment could be said to be authorized to be paid out of the mill tax money. Certainly it could not be said to be true of all administrative costs. However, we believe that there is a source from which payment can be made of such items as cannot be said to be authorized for payment out of the mill tax money. The administration of a subdistrict is an activity of the soil conservation district or districts in which the subdivision shall be located. Such a subdistrict is not a separate legal entity, and the activities carried on therein are those carried on by the soil conservation district or districts in which the subdistrict is located. We believe that any administrative expenses for which there is no authorization for payment out of the tax money can and should be paid out of other funds of the soil conservation district or districts in which the subdistrict is located. In support of this proposition, we enclose copies of opinions rendered by this department on July 18, 1955, to L. C. Carpenter, Chairman, Missouri Watershed Protection and Food Prevention Committee, and on January 13, 1955, to Honorable J. H. Longwell, Director, Division of Agricultural Science.

Honorable Harold Slusher

CONCLUSION

It is the opinion of this department that the mill tax money which is collected in subdistrict watersheds established under Chapter 278, Missouri Revised Statutes, Cumulative Supplement, 1957, may be used to pay the cost of advertising for bids and the construction of works of improvement in the watershed development; such tax money may not be used in connection with the election of trustees; administrative costs closely connected with construction of works of improvement may be paid from proceeds of the mill tax; such other items of administrative costs as may not be paid out of such mill tax money, may be paid out of funds of the soil conservation district or districts in which the subdistrict in question is located.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

HPW:lc;ar;vlw

Enclosures: Opinions to:

L. C. Carpenter - July 18, 1955
J. H. Longwell - January 13, 1955

COUNTY COURT: Presiding Judge unauthorized by any Missouri statute to adjourn court on his own motion, when all three judges are present and when motion is not presented to entire court and adopted by a majority of the members present, voting in favor of motion.

September 6, 1960



Honorable Charles H. Sloan
Prosecuting Attorney
Ray County
Richmond, Missouri

Dear Mr. Sloan:

This office is in receipt of your recent request for a legal opinion, which reads as follows:

"Can the Presiding Judge of the County Court adjourn a court hearing on his own motion when the other two associate judges wish to stay in session?"

Article VI, Section 7, Constitution of Missouri, provides for county courts, the number of members, their powers and duties. Said section reads as follows:

"In each county not framing and adopting its own charter or adopting an alternative form of county government, there shall be elected a county court of three members which shall manage all county business as prescribed by law, and keep an accurate record of its proceedings. The voters of any county may reduce the number of members to one or two as provided by law."

Various statutory provisions implement the above quoted constitutional provisions and will be referred to in the course of our discussion herein.

The first of these statutes is Section 49.020, RSMo 1949. Said section provides for the election of a county court judge by the qualified voters of each district of the county, who shall hold his office for a term of two years and until his successor is duly elected and qualified. A presiding judge of the county court shall

Honorable Charles H. Sloan

also be elected by the qualified voters of the county, at large, who shall hold his office for a term of four years and until his successor is duly elected and qualified. Each county judge shall enter upon the discharge of his duties on the first of January next after his election.

The term of office of a county judge in a county having a population of not less than 250,000 and not more than 450,000 inhabitants, is fixed at four years by Section 49.030, RSMo 1949.

Ray County has less than 250,000 inhabitants, hence the election and term of office of each county judge elected therein is governed by Section 49.020 and not by Section 49.030.

Section 49.070, RSMo Cumulative Supplement 1957, provides how many judges of the county court shall constitute a quorum, and reads as follows:

"A majority of the judges of the county court shall constitute a quorum to do business; a single member may adjourn from day to day, and require the attendance of those absent; when but two judges are sitting and they shall disagree in any matter submitted to them, the decision of the presiding judge shall stand as the decision of the court; provided further when the presiding judge is absent and the other two judges are present the county clerk shall designate one of such judges present as presiding judge during the absence of the regular presiding judge, and such judge shall during the absence of the regular presiding judge have all of the powers of the regular presiding judge."

In this connection it is believed proper to consider some of the characteristics and powers of that body to which individual members are elected in each county of the state, namely, county courts.

In the case of *Rippeto v. Thompson*, 216 S.W. 2d 505, the Supreme Court held that under provisions of the new Constitution of Missouri, county courts are no longer vested with judicial power, are not courts of record, and they are not what is generally referred to as courts of law. Their status has been reduced to that of ministerial bodies to manage the county's business. This appears to be particularly true with reference to financial affairs of the county.

Again, in the case of *Bradford v. Phelps County*, 210 S.W. 2d 996, it was held that a county court is only the agent of the county with no powers except those granted and limited by law, and, like other agents, it must pursue its authority and act within the scope

Honorable Charles H. Sloan

of its powers.

By analogy, it appears that each individual member of the county court would possess only those powers as such public officials, which have been expressly granted to them by statute or those necessarily implied from such statute.

A careful examination of Chapter 49, RSMo 1949, on county courts, fails to disclose any statutory grant of official powers and duties to the presiding judge of a county court which are any different from, or in addition to those conferred upon the other judges of the court, with one possible exception found in Section 49.070, supra, and referred to in the next paragraph.

It will be recalled that Section 49.070 refers to instances when two judges are present and they disagree upon any matter submitted to them, the decision of the presiding judge shall stand as the decision of the court. The section further refers to instances when the presiding judge is absent and the two associate judges are present, that the judge designated as presiding judge by the county clerk shall have all the powers of the regular presiding judge during the absence of such judge.

This latter portion of the section implies that if the two judges are unable to agree upon any matter of business before the court, the decision of the one designated to act as presiding judge shall stand as the decision of the court.

As the title to his office indicates, it is the duty of the presiding judge, or president, to preside over each session of the court. It is incumbent upon him to present all matters before the court. Except in the instances referred to above, his vote upon any proposition for decision of the court counts no more than that of any other member, and his decision alone, except in such instances referred to above, is not the decision of the court.

Subject to the abovementioned exception, it is our thought that the lawmakers did not intend for the presiding judge to have any greater power or authority to make final decisions upon court business than the other judges. Rather, it appears to be the legislative intent that each judge should have an equal voice and vote upon all matters of business properly before the court.

It is interesting to observe how such a situation is looked upon and dealt with in other jurisdictions. In this connection we call attention to the case of *Hansbro v. Neiderhofer*, 83 S.W.2d 685, and which we believe fully supports the foregoing remarks.

The Civil Appeals Court of Texas had before it for decision

Honorable Charles H. Sloan

a question involving the power of a county judge, who, under Texas statutes, was presiding judge of the Commissioners' Court. Such Court is very similar in many respects to a Missouri county court. In this case it was held the presiding judge of a commissioners' court had no discretion in receiving and submitting all motions to a vote of the court and, for a refusal to perform this ministerial duty, he could be compelled to do so by mandamus. At l.c. 685, 686, the court said:

"The commissioners' court having jurisdiction of the matter, the county judge, as its presiding officer, has no discretion in receiving motions offered in the regular discharge of the court's business, and submitting said motions to a vote of the members of the court for their decision, but must permit the members composing the court to exercise their will in adopting or rejecting such proposals. While an official cannot be mandamusd to do an act in a certain way which involves his discretion, yet when he refuses to discharge the duties devolving upon him in any way, that is, refuses to act at all, he may by mandamus be compelled to act. 28 Tex. Jur. pp.537-540, §13, and authorities cited. The receiving of motions and submitting them to a vote of the court does not involve the discretion of the county judge presiding over the commissioners' court, and so his acts in that capacity are merely ministerial. If he could, as he chose, refuse to receive a motion, when duly seconded, and refuse to allow the members of the court to vote on same, in the matter such as here involved, he could do so in other matters, and thus reduce the court to the pleasure, judgment, or will of the presiding officer, which is contrary to the purpose for which the court was created, and a perversion of the powers conferred upon the court by law."

In the absence of any applicable Missouri appellate court decisions as to the extent of the statutory grant of power to the presiding judge of a county court, it is believed the above cited case is in point with our foregoing remarks, and that in all probability said decision would be persuasive authority for a Missouri appellate court in making a similar decision with reference to the powers of a presiding judge of a Missouri county

Honorable Charles H. Sloan

court, if and when such question will have been submitted to the appellate court.

Absent any Missouri decisions in point, it is believed the above cited Texas decision is fully applicable to the present situation, and substantiates the views expressed herein, concerning the lack of any statutory grant of power to a presiding judge to adjourn court without first putting his motion before the entire court and obtaining a majority vote of those present and voting in favor of the adjournment.

Therefore, in view of the foregoing, our answer to the inquiry of the opinion request is in the negative.

CONCLUSION

Therefore, it is the opinion of this office that the presiding judge of a county court is unauthorized by any Missouri statute to adjourn a session of said court upon his own motion when all three judges are present and when said motion has not been presented to the entire court and adopted by a majority of the members present, voting in favor of such motion.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Paul N. Chitwood.

Yours very truly,

John M. Dalton
Attorney General

PNC:lc:mw

CRIMINAL LAW:
PUBLIC HEALTH AND
WELFARE:

Untried information referred to in Section 222.080 V.A.M.S. embraces (1) informations by prosecuting attorneys in misdemeanor cases filed under Supreme Court. Rules 21.03 and 21.04, and (2) informations filed by prosecuting attorneys in circuit court in felony cases after preliminary hearing has been accorded as required by Supreme Court Rule 23.02, but does not include an original "complaint" in felony cases made by a prosecuting attorney or other person, under authority found in Supreme Court Rule 21.08, preceding a preliminary hearing.

A Probate court or magistrate court is within descriptive term "court of record" as same is used in subparagraph (2) of Section 202.595 V.A.M.S. authorizing application for institutionalization in Missouri's "state schools" for mentally deficient but either court must have acquired proper jurisdiction of the persons in the premises.

October 14, 1960

Honorable Charles H. Sloan
Prosecuting Attorney
Ray County
Richmond, Missouri



Dear Mr. Sloan:

This opinion is rendered in answer to your recent request reading, in part, as follows:

"I respectfully ask that your office render an opinion for me on two sections of the Laws of 1959.

The first question is concerning the Uniform Mandatory Disposition of Detainers Law. Under section 222.080 it states that any person who is imprisoned in a correctional institution may request a final disposition of any untried indictment or information pending against him. I have received a request for final disposition of a matter which is untried and pending, but it is based only on a Affidavit of Complaint. The information would not be filed until said cause is certified to the Circuit Court for trial. The question is whether the person has a right to demand final disposition of this case prior to the time of his arraignment and preliminary hearing.

The second question involves section 202.595 of the Laws of 1959. This section involves admission of patients to the State School. Referring specifically to sub-section 2, can the Magistrate Court and the Probate Court both make the application for institutionalization as they are both Courts of Record?"

Your first question is so worded as to lead us to conclude that the affidavit of complaint referred to charges the commission of a felony rather than a misdemeanor. However, the wording of Missouri's new Uniform Mandatory Disposition of Detainers Law embodied in House Bill No. 259, passed by the 70th General Assembly of Missouri, and found at Sections 222.080 to 222.150, inclusive, V.A.M.S. makes it necessary for us to dispose of your inquiry as it may relate to both felonies and misdemeanors.

For the purpose of this opinion it is only necessary to quote paragraph 1 of Section 222.080 V.A.M.S. as follows:

"1. Any person imprisoned in a correctional institution of this state may request a final disposition of any untried indictment or information pending in this state against him while so imprisoned. The request shall be in writing addressed to the court in which the indictment or information is pending and to the prosecuting attorney charged with the duty of prosecuting it, and shall set forth the place of imprisonment."

Article I, Section 17, Missouri's Constitution of 1945 provides:

"That no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies, but this shall not be applied to cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger, nor to prevent arrests and preliminary examination in any criminal case."

Supreme Court Rule 21.01 provides:

"All felonies and misdemeanors shall be prosecuted by indictment or information. The court in which the prosecution shall be first commenced by the filing of the indictment or information, and the issuance of a warrant or summons thereon, shall retain jurisdiction and control of the cause to the exclusion of any other court so long as the same shall be pending."

Supreme Court Rule 21.02 provides, in part, as follows:

"Prosecutions before magistrates for misdemeanors shall be by information only * * *"

Supreme Court Rule 21.03 provides:

"The prosecuting attorney of a county or city in which an offense may be prosecuted may make

Honorable Charles H. Sloan:

an information charging the commission of a misdemeanor either upon his own knowledge, information and belief or upon the basis of a verified complaint previously submitted to him. Such information shall be filed in any court having jurisdiction to try the offense charged."

Supreme Court Rule 21.04 provides:

"A complaint of the commission of a misdemeanor, verified by oath or affirmation, may be filed with the magistrate having jurisdiction of the offense and if the magistrate is satisfied that the accused is about to escape, or has no known place of permanent residence or property in the county likely to restrain him from leaving for the offense charged, he shall immediately issue a warrant and have the accused arrested and held until the prosecuting attorney shall have time to file an information. Such complaint shall be transmitted forthwith to the prosecuting attorney whether or not a warrant has been issued thereon. After an investigation, if the prosecuting attorney is satisfied that there are reasonable grounds to believe that an offense has been committed and that a case against the accused can be made, he shall file an information with the magistrate founded upon or accompanied by such complaint."

We conclude, from language appearing in Article I, Section 17, Missouri's Constitution of 1945, and in Supreme Court Rules 21.01 to 21.04, inclusive, quoted supra, that criminal prosecutions for misdemeanors are in every instance based either upon an indictment found by a grand jury, or upon an information filed by the prosecuting attorney. When we find in paragraph 1 of Section 222.080 V.A.M.S. quoted supra, language referring to "any untried indictment or information", no language is found there, or in any other portion of said law, which would limit application of the law to informations charging only felonies.

Attention is now given to initiating of felony charges and their ultimate disposition through indictment or information.

Supreme Court Rule 21.08 provides:

"Whenever complaint shall be made in writing, verified by oath or affirmation (including an oath or affirmation on information and belief by a prosecuting attorney) and filed in any court having original jurisdiction to try criminal offenses, charging that a felony has been committed by a

Honorable Charles H. Sloan:

named accused, or if his name is unknown, by any name or description from which he can be identified with reasonable certainty, it shall be the duty of the judge or magistrate thereof, and, upon complaint made by the prosecuting attorney, it shall also be the duty of the clerk thereof to issue a warrant reciting the accusations and commanding the officer to whom it shall be directed forthwith to take the accused and bring him before such judge or magistrate to be dealt with according to law. If such warrant is issued under the hand of the judge or magistrate, it need not be sealed but if it is issued under the hand of the clerk of the court, the seal of the court shall be attached thereto."

Supreme Court Rule 23.01 provides:

"The term 'magistrate' as used in Rules 23.01-23.12 shall mean any judge or magistrate of a court having original jurisdiction to try criminal offenses."

Supreme Court Rule 23.02 provides:

"No information charging the commission of a felony shall be filed against any person unless the accused shall first have been accorded the right of a preliminary examination before a magistrate in the county where the offense is alleged to have been committed. The accused may waive a preliminary examination after consultation, or after being accorded the right of consultation, with his counsel. A record entry of such waiver shall be made and the magistrate shall hold the accused to answer in the court having jurisdiction of the offense of which he stands accused. If the offense is bailable and the accused has not previously been admitted to bail, he shall be admitted to bail as provided in these Rules. No preliminary examination shall be required where an information has been substituted for an indictment."

We need only to refer to Section 543.010 RSMo 1949, and state that magistrate courts in Missouri have "concurrent original jurisdiction" with circuit courts to try misdemeanors. Jurisdiction to try felony cases is reserved to the circuit courts by Article V, Section 14, Missouri's Constitution of 1945, and Section 541.020 RSMo 1949. While magistrate courts lack jurisdiction to try and finally dispose of a felony case, we find

Honorable Charles H. Sloan:

Supreme Court Rule 23.02, supra, laying down the requirement that a felony prosecution by information in the circuit court may not be initiated until the accused has first been accorded the right of a preliminary examination. Under Supreme Court Rule 21.08, supra, we find that any person may make a complaint in writing, verified by oath or affirmation (including an oath or affirmation on information and belief by a prosecuting attorney) charging that a felony has been committed, file the same in any court having original jurisdiction to try criminal offenses, obtain a warrant for arrest of the accused, and have him dealt with "according to law". In the case of a person, other than a prosecuting attorney, making a complaint under Supreme Court Rule 21.08, supra, such complaint must be by "oath or affirmation". Only a prosecuting attorney may make a complaint under Supreme Court Rule 21.08 "on oath or affirmation on information and belief". Such "complaint" in the magistrate court in felony cases is a requisite preliminary step to be taken before prosecution of a felony charge can be had in the circuit court, as witness the following language from State ex rel. Lamar v. Impey, 365 Mo. 437, 1.c. 441, 283 S.W.(2d) 480:

"In this State, prosecutions of felonies are by indictment or information. If by information, it is necessary to commence the prosecution by a complaint in a magistrate court where the defendant is given the right to have a preliminary hearing."

In view of the foregoing it must be concluded that the word "information", found in paragraph 1 of Section 222.080 V.A.M.S. of Missouri's Uniform Mandatory Disposition of Detainers Law can only embrace informations filed by prosecuting attorneys in misdemeanor cases under authority found in Supreme Court Rules 21.03 and 21.04 and informations filed by prosecuting attorneys in the circuit court in felony cases after preliminary hearing has been accorded the accused as required by Supreme Court Rule 23.02. The "complaint" in felony cases which may be made by a prosecuting attorney under Supreme Court Rule 21.08 is not to be characterized as an "untried * * information" as such language is used in paragraph 1 of Section 222.080 V.A.M.S. of Missouri's Uniform Mandatory Disposition of Detainers Law.

The second question posed in your request for this opinion involves Section 202.595 V.A.M.S. reading as follows:

"The division of mental diseases, subject to the availability of suitable accommodations, shall receive for diagnosis, care, training and treatment in a state school and hospital any mentally deficient person whose admission is applied for under any of the following procedures:

- (1) Institutionalization on medical certification.
- (2) Institutionalization on application of a court of record; or
- (3) Institutionalization on court order as provided in Section 211.201."

Honorable Charles H. Sloan:

You have referred specifically to the method of institutionalization found at subparagraph (2) in the foregoing statute, and ask if Probate Courts and Magistrate Courts may both make application for admission of a patient to the state school by reason of the fact that both of said courts are courts of record.

The statute being construed does not designate by name any particular "court of record" to which it refers. In view of the fact that Article V, Sec. 17, Missouri's Constitution of 1945, designates probate courts as courts of record, and Sections 476.010 and 517.050, RSMo 1949, designate magistrate courts as courts of record, we conclude that both courts fit the descriptive language found at subparagraph (2) of Section 202.595 V.A.M.S. when referring to "courts of record", and consequently either court may make the application for institutionalization mentioned in subparagraph (2) of the statute; provided, however, that either of said courts must have acquired proper jurisdiction of the person in the premises.

CONCLUSION

It is the opinion of this office that an "untried information", as such language is used in paragraph 1 of Section 222.080 V.A.M.S., of Missouri's Uniform Mandatory Disposition of Detainers Law, embraces (1) informations filed by prosecuting attorneys in misdemeanor cases under authority found in Supreme Court Rules 21.03 and 21.04 and (2) informations filed by prosecuting attorneys in the circuit court in felony cases after preliminary hearing has been accorded the accused as required by Supreme Court Rule 23.02; but an original "complaint" in felony cases which may be made by a prosecuting attorney or other person under authority found in Supreme Court Rule 21.08 preceding a preliminary hearing is not an "untried information" referred to in Section 222.080 V.A.M.S.

It is the further opinion of this office that a probate court or a magistrate court is within the descriptive term "court of record" as the same is used in subparagraph (2) of Section 202.595 V.A.M.S. authorizing application for institutionalization of persons in Missouri's "state schools" for mentally deficient; provided, however, that either of said courts must have acquired proper jurisdiction of the persons in the premises.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General

JLO:ms

CRIMINAL LAW:
PUBLIC SERVICE
COMMISSION:

A person convicted under Section 390.171, Missouri Revised statute, Cum. Sup., 1957 should be punished upon the basis of the statutory penalty set forth as punishment for the conviction of a misdemeanor in Section 556.270 RSMo 1949.

November 10, 1960

Mr. Ike Skelton, Jr.
Prosecuting Attorney
Lafayette County
Lexington, Missouri



Dear Sir:

Your recent request for an official opinion reads:

"Section 390.176 par. 1 R.S. Mo. 1957 Supplement states among other things, 'a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense'.

"The question has arisen as to whether the penalty referred to should or should not be construed as the minimum and maximum penalty to be assessed upon a plea of guilty or a finding of guilty in a prosecution under the preceding section 390.171 R. S. Mo. 157 Supplement or, should the statutory penalty for a misdemeanor apply to a fine of \$1.00 to \$1000.00 or one year in the county jail or both."

Section 390.171 Missouri Revised Cum. Sup. 1957 reads:

"Every owner, officer, agent or employee of any motor carrier, and every other person, who violates or fails to comply with or who procures, aids or abets in the violation of any provision of sections 390.011 to 390.176, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement of the commission, or who procures, aids or abets any person in

Mr. Ike Skelton, Jr.

his failure to obey, observe or comply with any such order, decision, rule, direction, demand or regulation thereof shall be guilty of a misdemeanor."

Section 390.176 reads:

"1. Any person operating as a motor carrier who violates or fails to comply with any provision of the constitution of this state or of this or any other law, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission is subject to a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense.

2. Every violation of the provisions of this or any other law or of any order, decision, decree, rule, direction, demand or requirement of the commission, or any part or portion thereof, by any person operating as a motor carrier is a separate and distinct offense, and in case of continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense.

3. In construing and enforcing the provisions of sections 390.011 to 390.176 relating to penalties, the act, omission or failure of any officer, agent or employee of any person operating as a motor carrier acting within the scope of his official duties of employment, shall in every case be and be deemed to be the act, omission or failure of such person."

This latter section, in our opinion, relates to a separate proceeding to recover the penalty therein provided, and not to criminal proceedings under §390.171, supra. That this is true is indicated by §390.156 which reads:

"An action to recover a penalty or a forfeiture under sections 390.011 to 390.176 or to enforce the powers of the commission under this or any other law may be brought in any circuit court in this state in the name of the state of Missouri and shall be commenced and prosecuted to final judgment by the general counsel to the commission.

Mr. Ike Skelton, Jr.

In any such action all penalties and forfeitures incurred up to the time of commencing the same may be sued for and recovered therein, and the commencement of an action to recover a penalty or forfeiture shall not be or be held to be, a waiver of the right to recover any other penalty or forfeiture; if the defendant in such action shall prove that during any portion of the time for which it is sought to recover penalties or forfeitures for a violation of an order or decision of the commission, the defendant was actually and in good faith prosecuting a suit to review such order or decision in the manner as provided in sections 390.011 to 390.176, the court shall remit the penalties or forfeitures incurred during the pendency of such proceeding. All moneys recovered as a penalty or forfeiture shall be paid to the public school fund of the state. Any such action may be compromised or discontinued on application of the commission upon such terms as the court shall approve and order."

We therefore conclude that the penalties fixed by section 390.176 are those authorized to be collected by action instituted by the General Counsel to the Public Service Commission, under Section 390.156. They are separate from and unrelated to punishment which may be imposed for violations of Section 390.011 to 390.176 under criminal prosecution as misdemeanors.

Clearly Section 390.171 makes the offenses therein defined misdemeanors. Since no punishment otherwise is fixed, Section 556.270 RSMo 1949 would apply. That section reads:

"Punishment for misdemeanor in cases not fixed by law --. Whenever any offense is declared by statute to be a misdemeanor, and no punishment is prescribed by that or any other statute, the offender shall be punished by imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment."

CONCLUSION

It is the opinion of this department that a person convicted under section 390.171, Missouri Revised Statutes, Cum. Sup. 1957, should be punished upon the basis of the statutory penalties set forth as punishment upon conviction of a misdemeanor, in section 556.270 RSMo 1949.

Mr. Ike Skelton, Jr.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:ms

REGISTERED ENGINEERS:
MUNICIPALITIES:

The Water Pollution Board should accept plans and specifications submitted by duly appointed city engineers without regard to whether they are licensed in the state.

December 7, 1960



Honorable Jack K. Smith
Executive Secretary
Water Pollution Board
112 West High
Jefferson City, Missouri

Dear Mr. Smith:

This will acknowledge receipt of your request for an opinion which reads:

"From time to time a city engineer not registered in Missouri but duly appointed by city officials submits plans and specifications for sewer extension to us for review and issuance of permits.

"We desire your opinion as to whether or not we should accept plans and specifications for sewage works improvements from a city engineer who is not registered in this state."

You also state the Water Pollution Board has adopted a regulation which requires plans and specifications for sewage improvements submitted to the Board be prepared by an engineer licensed in Missouri.

Certain regulations pertaining to the issuance of a permit, the open public hearing rules, the application for a permit and construction and operating permits were submitted to this office for review by the State Division of Health; and in a letter dated August 25, 1958, this office approved the regulations in general as being valid and consistent with Chapter 204, RSMo, Cum. Supp. 1957. This regulation you mentioned above was included as part of those regulations.

You now inquire about a specific regulation as applied to particular facts; namely, whether you should accept plans submitted by a duly appointed city engineer who is not licensed

Honorable Jack K. Smith

in the state since you have a regulation requiring all plans to be prepared by a licensed engineer.

Section 204.030, subdivision (3), V.A.M.S., provides in part that any person desiring to erect or modify facilities or commence or alter an operation of any type which will result in a discharge of sewage, industrial waste or other wastes into the waters of the state which will constitute a pollution as defined in this act, shall apply to the Water Pollution Board for a permit. This section further provides:

"***The board, under the conditions it prescribes, may require the submission of such plans, specifications and other information as it deems relevant in connection with the issuance of the permits. The board shall determine whether or not the discharge will cause a condition of pollution contrary to the public interest. ***"

It should be observed there is no express statutory provision requiring the plan submitted to have been prepared by a licensed engineer. Therefore, the question arises whether such an authority may be implied.

The statute provides the Board may require the submission of such plans, specifications and other information it deems relevant. This is to enable a board to determine from the plans submitted whether the act contemplated will cause excessive pollution. Their action must be governed by what the plans reveal and not the manner in which such plans were prepared.

Their duty is to examine the plans submitted and determined from them, and any other information they may have and acquire, determine whether the facility constructed according to the plans will cause or prevent excessive pollution of the waters of the state.

CONCLUSION

It is, therefore, our opinion that the rule of the Water Pollution Board requiring that plans submitted be prepared by a licensed engineer is invalid because it is in excess of the power and authority granted the Board.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,

JOHN M. DALTON
Attorney General

AMM:ar/ml

PUBLIC ADMINISTRATORS:
ESTATES:
PROBATE COURTS:

The Legislature has prescribed by passage of Section 473.153, paragraph 5, V.A.M.S., that every administrator who is not an attorney, may not appear in court, except by attorney, and this section of law includes public administrators who must meet the same requirements as an individual administrator, and public administrators, like individual administrators, may file their own inventories and settlements.



May 6, 1960

#40

Honorable Edward W. Speiser
Prosecuting Attorney
Chariton County
Keytesville, Missouri

Dear Mr. Speiser:

This is in answer to your opinion request of recent date which reads in part as follows:

"Section 473.153, Sub-section 5, provides that 'no executor or administrator other than one who is an attorney may appear in court, except by an attorney.'

"The Public Administrator would like to know whether or not he may serve and appear in Probate Court without an attorney. The Public Administrator is not an attorney."

This office has already said in an opinion to the Honorable Lee C. Sutton, Member, House of Representatives, dated April 23, 1956, that the Legislature having prescribed the method of administration of an estate and the rules and regulations to be observed in relation thereto - "that no executor or administrator, unless he is an attorney, may appear in court except by attorney," and "that any executor or administrator may prepare and file his own inventories and settlements," we are bound to follow, and may not prescribe a practice in contravention to, the provisions as enacted by the Legislature.

The above opinion is based on Section 473.153, paragraph 5, V.A.M.S., and this paragraph reads as follows:

"No executor or administrator, other than one who is an attorney, may appear in court

Honorable Edward W. Speiser

except by attorney, and such attorney may not be a salaried employee of the executor or administrator, but when the executor or administrator is an attorney, nothing herein shall prevent his being represented in court by a partner, associate or employee who is an attorney. Any executor or administrator may prepare and file his own inventories and settlements."

It is to be noted at this point that the Legislature did not in the above quoted section of law expressly exclude or exempt public administrators from said statute.

We therefore turn to an examination and comparison of the statutes pertaining to the public administrator and an individual administrator or executor.

Sections 473.730, et seq., V.A.M.S., sets forth the law pertaining to public administrators and reads in part as follows:

"Every county in this state, and the city of St. Louis, shall elect a public administrator at the general election in the year 1880, and every four years thereafter, who shall be ex officio public guardian and curator in and for his county. Before entering on the duties of his office, he shall take the oath required by the constitution, and enter into bond to the state of Missouri in a sum not less than ten thousand dollars, with two or more securities, approved by the probate court and conditioned that he will faithfully discharge all the duties of his office, * * *" (Emphasis supplied.)

The duties of the public administrator are provided for in Section 473.743 and because of its length it will not be quoted but suffice it to say it provides the instances and circumstances under which he is authorized to take into his charge and custody the estates of deceased persons.

In Section 473.750, V.A.M.S., reference is made to the powers of the public administrator and reads as follows:

"In addition to the provisions of sections 473.730 to 473.767, he and his securities shall have the same powers as are conferred upon, and be subject to the same duties, penalties, provisions and proceedings as are

Honorable Edward W. Speiser

enjoined upon or authorized against executors and administrators, guardians and curators by chapters 472 to 475, RSMo, so far as the same may be applicable. He shall have power to administer oaths and affirmations in all matters relating or belonging to the exercise of his office."

Sections 473.110 to 473.217, V.A.M.S., provides for individual administrators and executors and sets forth their qualifications, etc.

And Section 472.010, V.A.M.S., defines the term administrator as follows:

"'Administrator' includes any administrator de bonis non, administrator cum testamento annexo and administrator during absence or minority." (Emphasis ours)

Although we are unable to find any appellate decisions directly in point, the Supreme Court of Missouri had an occasion to discuss this subject and the position of individual administrator and executor as compared to the office of public administrator in the case of State ex rel. Russell v. Mueller, 60 SW2d 48, 50, par. [2] and said as follows:

"Of course, the very nature of the public administrator's office serves to differentiate certain features of his administration of an estate from that of an individual administrator or executor, yet in all material respects the duties and liabilities are the same.***"
(Emphasis ours)

Our Supreme Court has by this case thus indicated that "in all material respects the duties and liabilities" of the above two positions, i.e., individual administrators and public administrators, are the same. And it is also evident from reading paragraph five of Section 473.153, supra, as above quoted, that the Legislature made no express exemption for public administrators. The language used in this section is clear -- "No executor or administrator, * * * may appear in court except by attorney," and this indicates that when the executor or administrator is not an attorney, then he must employ one before making an appearance in court.

Honorable Edward W. Speiser

Your attention is also called to 34 C.J.S., Section 1050, page 1334, where there is a general discussion concerning public administrators and the following statement of law is found concerning this subject:

"* * *He holds substantially the same relation to each individual estate committed to his charge that a private administrator would, being liable to the same extent and amenable to the same remedies."

After an examination of the statutes applicable to your question and above court case, we are not convinced that the Legislature intended for Section 473.153 to apply only to individual executors or administrators and not to public administrators. Our Court has already said that the office of public administrator and individual executor or administrator does not "materially differ." In view of the above, we are therefore not prepared to say that paragraph 5 of Section 473.153, supra, does not apply to public administrators.

CONCLUSION

It is, therefore, the opinion of this office that the Legislature has prescribed, by passage of Section 473.153, paragraph 5, V.A.M.S., that every administrator who is not an attorney may not appear in court, except by attorney and this section of the law includes public administrators who must meet the same requirements as an individual administrator, and that public administrators, like individual administrators, may file their own inventories and settlements.

The foregoing opinion, which I hereby approve, was prepared by my assistant, J. Burleigh Arnold.

Yours very truly,

John M. Dalton
Attorney General

JED:vlw:ar

WATER POLLUTION BOARD: All employees of the Water Pollution Board come within the compass of the merit system, except for the exemptions noted in Section 191.070, RSMo, Cum. Supp. 1957. The Water Pollution Board is an "appointing authority" within the meaning of Section 36.020, House Bill No. 111 enacted by the 70th General Assembly.

January 29, 1960

Honorable N. F. Steenberger
Director, Personnel Division
100 E. Capitol Avenue
Jefferson City, Missouri



Dear Mr. Steenberger:

Your request for an official opinion reads:

"Questions have been raised recently concerning the positions and employees of the State 'Water Pollution Board' being subject to the State Merit System Law. Since the enactment of Section 204, RSMo, Cum. Supp. 1957, employees of the State Division of Health have performed duties involving the function of water pollution and the 'Water Pollution Board' has been considered an operating unit of the Division of Health.

"Under date of September 25, 1959, the Acting Director of the Division of Health advised this office he no longer considered the Division of Health the appointing authority for the 'Water Pollution Board.' Apparently there is some conflict between the Division of Health and the 'Water Pollution Board' relating to the final administrative control and authority for water pollution activities in the State. As I understand the situation, certain employees of the Division of Health who have Merit System status are being transferred to the 'Water Pollution Board' and the Board will presumably operate as a separate agency of State Government.

"The question, therefore, arises as to the Merit Law applying to positions and employees of this Board. The following portions of the Merit System Law and portions of the Water Pollution Law appear to be pertinent:

"Section 36.020, RSMo 1949, (1) 'appointing authority' means an officer or agency subject

to this Law having power to make appointments;
(2) 'Division of Service' means a state department or any division or branch thereof, or any agency of the state government, all the positions and employees in which are under the same appointing authority.

"Section 36.030 -2- 'The provisions of this Chapter shall apply to all offices and employees of the State Department of Public Health and Welfare . . . , except such offices, positions and employees within the above named agencies as are herein specifically exempt.' -3- 'The following offices, positions and appointments in the agencies covered by this Chapter are hereby exempted from the operation of this law and may be filled without regard to those provisions hereof which relate to the selection, appointment, pay, tenure, and removal of persons employed in such agencies;' . . .

"(2) 'One secretary for each board or commission, the members of which are appointed by the Governor . . . '

"Section 204.070 -1, RSMo, Cum. Supp. 1957:
'There is hereby created within the Division of Health of the Department of Public Health and Welfare a State Water Pollution Board . . . ' -4- ' . . . The members of the board, at their first meeting, shall select a qualified executive secretary for the board who shall act as its administrative agent.'

"Section 204.140 ' . . . The board, in addition, may employ the technical and clerical personnel it deems necessary, . . . '

"We are particularly interested in knowing if the 'Water Pollution Board' is considered an 'appointing authority' and a 'Division of Service' within the meaning of Section 36.020 (1) and (2) of the Revised Statutes of Missouri, 1949. Or, is this 'Board' only a part of the Division of Health which is the 'appointing authority' and the 'Division of Service' for employees of the Water Pollution Board? Secondly, is the Executive Secretary referred to in Section 204.070 -4, RSMo, Cum. Supp. 1957, exempt under Section 36.030 (2) and (3), RSMo 1949? Further, are employees of the Water Pollution Board employed pursuant to Section 204.140, RSMo, Cum. Supp. 1957, subject to the Merit System Law as provided for in Section 36.030 (2), RSMo 1949?"

Honorable N. F. Steenberger

On October 14, 1948, this department rendered an opinion, a copy of which is enclosed, to Honorable Ralph J. Turner, Director, Personnel Division, Department of Business and Public Administration, Jefferson City, Missouri. We believe that this opinion is applicable to the employees of the Water Pollution Board generally. We also enclose a copy of an opinion rendered October 1, 1952, to the Board of Trustees, State Federal Soldiers' Home, St. James, Missouri. We believe that this opinion substantiates the Turner opinion, and that the two opinions are authority for the proposition that employees of the Water Pollution Board do come within the compass of the merit system. We believe that on the basis of the two above opinions that employees of the Water Pollution Board, which is created within the Division of Health of the Department of Public Health and Welfare, are employees of the Department of Public Health and Welfare, and that since employees of the Department of Public Health and Welfare, with certain exceptions, are under the merit system, that employees of the Water Pollution Board are also under the merit system.

You inquire particularly regarding the Secretary of the Water Pollution Board, which is provided for in numbered paragraph 4 of Section 204.070, RSMo, Cum. Supp. 1957. Your inquiry is as to whether or not this Secretary comes within the merit system. That paragraph reads:

"4. At the first meeting of the board and at yearly intervals thereafter, the members shall select from among themselves a chairman and a vice-chairman. The members of the board, at their first meeting, shall select a qualified executive secretary for the board who shall act as its administrative agent."

In connection with the above we note the following portions of Section 36.030 of House Bill No. 111 enacted by the 70th General Assembly. That Bill reads in part:

"1. A system of personnel administration based on merit principles and designed to secure efficient administration is established for all offices, positions and employees of the state department of public health and welfare, the state department of corrections, the personnel division of the department of business and administration and the division of employment security of the department of labor and industrial relations, except that the following offices and positions of these agencies are not subject to this law and may be filled without regard to its provisions:

* * * * *

Honorable N. F. Steenberger

(2) One secretary for each board or commission the members of which are appointed by the governor, except the personnel advisory board."

From the above it would appear that the Secretary of the Water Pollution Board was exempted from the application of the Merit System Law. However, we also note numbered paragraph 1 of Section 191.070, RSMo, Cum. Supp. 1957, which reads:

"1. All employees of the department of public health and welfare, except the department director, the division directors, and one secretary for each director, chaplains, patients or inmates of state charitable institutions who may also be employees in such institutions, and persons employed in an internship capacity as a part of their formal training leading to an academic degree, shall be selected in accordance with the state merit system law, notwithstanding that such office, position, or employment may be specifically exempted under the state merit system law. Such employees shall be persons of good character and integrity and residents of this state for one year, except that residence in this state shall not be necessary in cases of appointment of physicians, nurses, technicians, dietitians, and other professionally trained personnel."

It will be noted that this section holds that, with certain exceptions which do not include the Secretary of the Water Pollution Board, that all other employees shall be selected in accordance with the State Merit System Law "notwithstanding that such office, position, or employment may be specifically exempted under the State Merit System Law."

Under the State Merit System Law we believe that the Secretary of the Water Pollution Board is exempted from the application of the merit system, but obviously, since he is not within any of the exceptions set forth in Section 191.070, supra, he comes within the application of the Merit System Law by virtue of that section. We believe that this is a situation in which Section 36.030 of House Bill No. 111, supra, is a general law on this subject, and that Section 191.070, supra, is a special law. It is a well-established principle of Missouri law that where a general law and a special law are in conflict, as would appear to be the case here, that the special law prevails.

In the case of *Vining v. Probst*, 186 SW2d 611, the Kansas City Court of Appeals stated (l.c. 615 [1-4]):

Honorable N. F. Steenberger

"* * * If there be any conflict between two statutes dealing with the same common subject matter, the statute which deals with it in a minute and particular way will prevail over one of a more general nature; and the statute which takes effect at the later date will also usually prevail. Measured by both of these last mentioned rules, the provisions of the 'Small Loan Laws' prevail over those of the interest laws. If the later law did repeal the earlier, in part, by implication, it did so only insofar as the two may be in conflict; but, in any event, it is apparent that there are cases, such as that now under consideration, where the provisions of both statutes cannot be applied effectively. State v. Taylor, 323 Mo. 15, 18 SW2d 474, 1.c. 477."

The same holding was made in the case of State v. Mangiaracina, 125 SW2d 58, 1.c. 60 [1-4]. Also in the case of State v. Smith, 125 SW2d 883, 1.c. 885 [5-8]. It would, therefore, seem that employees of the Water Pollution Board would come within the compass of the State Merit System Law.

You also inquire whether the Water Pollution Board is an "appointing authority" and a "division of service" within the meaning of the law.

We note by House Bill No. 111 enacted by the 70th General Assembly that Section 36.020 states:

"Unless the context clearly requires otherwise, the following terms mean:

(1) 'Appointing authority,' an officer or agency subject to this law having power to make appointments;

* * * *

(3) 'Division of service' or 'division,' a state department or any division or branch thereof, or any agency of the state government, all the positions and employees in which are under the same appointing authority."

Inasmuch as the Water Pollution Board is given authority under Section 204.070 and Section 204.140, RSMo, Cum. Supp. 1957, to directly employ personnel, we would say that the answer to your question regarding whether the Water Pollution Board is an "appointing authority" is in the affirmative.

You have orally informed us that we may disregard your question as to whether the Water Pollution Board is a "division of service."

Honorable N. F. Steenberger

CONCLUSION

It is the opinion of this department that all employees of the Water Pollution Board come within the compass of the merit system, except for the exemptions noted in Section 191.070, RSMo, Cum. Supp. 1957.

It is the further opinion of this department that the Water Pollution Board is an "appointing authority" within the meaning of Section 36.020, House Bill No. 111 enacted by the 70th General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:ar
Enclosure

ELECTIONS:

COUNTY CLERK:

County clerk not required under Chapter 116 to publish notice that registration books will be closed for a period of 28 days before election. Cost of publication of such notice is not a proper expense of the county.

May 6, 1960



Honorable Frederick E. Steck
Prosecuting Attorney
Scott County
Scott County Milling Co. Building
Sikeston, Missouri

Dear Mr. Steck:

We have your request for an opinion of this office, which request reads as follows:

"I would like an opinion as to whether or not it is the obligation of the County Clerk to run a registration notice for a city election which pertains only the the City of Sikeston. An example of such a notice is as follows:

'Notice to Voters - Registration Books for the City of Sikeston, Missouri will be closed 28 days prior to City election. You must be registered before this time to be eligible to vote in said election.'

"I would further like to know if it is the obligation of the County to pay for such a notice or is it the obligation of the City."

Registration of voters in the City of Sikeston is governed by Chapter 116, V.A.M.S. Section 116.030 provides, in part, as follows:

"Any qualified elector who registers as herein provided shall be entitled to vote in the election precinct where his or her

Honorable Frederick E. Steck

name is registered and in which he or she is registered as a resident. Any such person shall register for the purpose of the first general registration herein referred to under the supervision of the county clerk of the county in which any such city may be located. The county clerk of such county shall be in charge of such general registration and all other registrations provided for by this chapter. The said county clerk and his deputies shall have the power to administer oaths and perform all other duties necessary to carry out the provisions of this chapter. * * * The county clerk's office shall be open for permanent registration at all times that such office is open for other business, Sundays and holidays excepted. No person shall be entitled to register within a period of twenty-eight days prior to any election in which the registration records provided for in this chapter are to be used. * * *

The powers and duties of the county clerk as the official in charge of registration "are regulated entirely by constitutional and statutory provisions." 29 C.J.S., Elections, Section 43, Page 63. We find no requirement in Chapter 116 or elsewhere that the county clerk publish a notice of the nature set out in your inquiry. There are in Chapter 116 provisions for the publication of certain notices. Thus, Section 116.050 requires the county clerk to publish the location of places of temporary registration. Section 116.090 requires him to publish the list of names of voters not found on canvass or otherwise improperly registered.

Inasmuch as the legislature has made express provisions for such publication but has not seen fit to require the county clerk to publish notices of the nature here under consideration, we are of the opinion that the county clerk is under no obligation to publish such notice.

As for the liability of the county for the costs of publication of such notice, should it be published, Section 116.050, V.A.M.S. contains the following provision:

Honorable Frederick E. Steck

"The county court shall provide for and pay * * * all other expenses necessarily incurred under the operation of this chapter."

As we have previously pointed out, there is no requirement for the publication of a notice such as this and we are of the opinion that the expense of such publication would, therefore, not be an expense necessarily incurred under the operation of Chapter 116. In our opinion, the expenses referred to in Section 116.050, supra, are those required to be incurred in the carrying out of the duties imposed under the chapter and where there is no duty imposed there is no liability for expenses. In this connection, it is our opinion that the phrase "expenses necessarily incurred" does not include desirable or convenient expenditures but only those required. See State ex rel. v. Hackmann, 275 Mo. 636, l.c. 650.

Inasmuch as your official concern in this matter is limited to the county's obligation, we will not go into the question of whether or not the cost of publication of such notice would be a proper obligation of the City of Sikeston.

CONCLUSION.

Therefore, it is the opinion of this office that the county clerk in a county wherein registration of voters is held under Chapter 116, V.A.M.S., is not required to publish notice that the registration books will be closed for a period of twenty-eight days prior to a municipal election. We are further of the opinion that should such notice be published by the county clerk, the expense of such publication would not be a proper obligation of the county.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

JOHN M. DALTON
Attorney General

RRW:mc

COUNTY TREASURERS:
COUNTY OFFICERS:
COUNTY DEPOSITORIES:

The county has a duty to reimburse county treasurer for his expenses in making bank deposits at the various county depositories, where such depositories are located outside the county seat. Reimbursement may be made on the basis of actual expenses or by mileage, but if made on a mileage basis, it must not exceed actual expenses.

July 22, 1960

Honorable Frederick Steck
Prosecuting Attorney
Scott County
Sikeston, Missouri



Dear Sir:

This is in reply to your recent request for an opinion as to whether or not it is the duty on the part of the county to pay the county treasurer mileage for making bank deposits. Your request reads:

"I would appreciate an opinion as to whether or not it is the duty of the County to pay the County Treasurer mileage for going to different Banks in Scott County to deposit money when there is no Bank in the County seat, Benton, Missouri."

Compensation of county treasurers is provided by Section 54.260, V.A.M.S., enacted during the last legislative session. This section provides for salary compensation of county treasurers in third-class counties according to population and concludes with the following sentence: "The salaries are in lieu of any other or additional salaries, fees, commissions or emoluments of whatsoever kind."

In enacting this provision as to the treasurer's office, the Legislature established the treasurer's full compensation in third-class counties. It is well established cannon of law relating to compensation of public officers, that in order to claim compensation for their services, a county officer must be able to point to a statute providing such compensation and Section 54.260, supra, clearly and specifically limits compensation. It remains to be decided, however, whether mileage payments to the treasurer for making bank deposits are compensation to this officer or an expense of the office.

Expenses of the county treasurer's office are paid by the county. Sections 54.100 and 54.110, RSMo 1949, read as follows:

Sec. 54.100:

"The county treasurer shall keep his office at the county seat of the county for which he was elected, and shall attend the same during the usual business hours. The county court shall provide said county treasurer with suitable rooms, and a secure vault in the courthouse or other building occupied by other county officers, and the county treasurer shall keep his office and records in such rooms and vault provided by the county court. He shall receive all moneys payable into the county treasury, and disburse the same on warrants drawn by order of the county court."

Sec. 54.110:

"He shall provide, under the direction of the county court, suitable books and stationery for his office, and preserve the same; and the court shall audit his account, and allow such sum as shall be reasonable, which shall be paid by the county."

The county, by the terms of Section 54.070, RSMo, pays for the treasurer's general bond for the faithful performance of his duties and Section 54.160, V.A.M.S., provides that the county pays for the treasurer's bond in connection with the handling of school funds.

Our Supreme Court in the case of Buchanan vs. Ralls County, 283 Mo. 10, 222 S.W. 1002, confirmed that it was incumbent upon the county to provide suitable office space, janitorial services, etc., for the county treasurer or that the county treasurer might provide these necessities and seek reimbursement.

Chapter 54, RSMo 1949, the chapter of our statutes which governs the duties, compensation and expenses of the office of county treasurer do not provide mileage as an expense for any purpose, neither does this chapter establish a duty incumbent upon the county treasurer to make bank deposits to the various depositories selected by the county court. Since those duties are established under the provisions of Chapter 110, RSMo 1949, governing the depository of public funds, we next turn to a consideration of the provisions of that chapter of our laws.

Honorable Frederick Steck

By the terms of Section 110.170, V.A.M.S., the county treasurer is required to immediately make deposits in the various county depositories, according to their proper share of the funds let. If the treasurer does not make these deposits, he is subject to a penalty which accrues to the depository bank. Section 110.170, V.A.M.S., reads:

"1. As soon as the required security is given and approved, the court shall make an order designating the successful bidders as depositories of the funds until sixty-five days after the time fixed by sections 110.130 to 110.260 for another selection, and thereupon the county treasurer, and the ex officio collector if the county be under township organization, shall immediately upon the making of the order, transfer to the depositories the part or parts of all funds respectively let to the depositories under the selection, and immediately upon the receipt of any money thereafter deposit it with the depositories to the credit of the county. The said treasurer shall, as nearly as may be, maintain with each of the depositories selected its due and proportionate share of the total of the funds let.

"2. For any failure of the county treasurer to make transfer of the funds or to deposit all of the funds with the depositories, whether the same shall come into his hands as treasurer or as ex officio collector of the revenue, or otherwise, he is liable to the depositories, respectively, for ten per cent per month, during such failure, upon the respective part or parts of said funds not so deposited, to be recovered by civil action.

"3. In counties under township organization the township trustee shall deposit all school taxes received by him with the depository selected by the township board of his township as the depository of the township funds; and in default of the selection of a depository by the township board, and during the time when any township has no depository of its funds,

Honorable Frederick Steck

the township trustee shall deposit all school taxes and all township funds received by him in any county depository within the township, if there be one; if not, then in the county depository most convenient to the township, and such county depository shall thereupon pay to the township the same rate of interest upon the moneys which it has contracted to pay the county upon its funds, and the township may recover the same by civil action."

If the treasurer is required to travel to points outside the county seat or to several places throughout the county to make deposits, then the expenses incurred by him in making deposits are an expense of the office, which should be paid by the county. It is true that he cannot point to a specific statute granting compensation or mileage for this duty, but we think that this is an expense of the office, not a "salary," "fee," "commission", or "emolument."

In Harlen County v. Blair, 243 Ky. 777, 49 S.W.2d 1028, the Kentucky Supreme Court differentiated fees and expenses as follows:

"Expenses incurred in performing services is distinct and separate from fees allowed for rendering such services. Fees to an officer are recompense for his services, while expenses allowed him are designed to indemnify or reimburse him for funds expended in performing his duties."

"Commission" denotes percentage compensation for service performed and is used at times synonymously with the terms "percentage" and "fee." See in this respect City of Pittsburg vs. Grenet, 238 Pa. 567, 86 Atl. 462, 465.

In Marioneaux v. Cutler, 32 Utah 475, 91 Pac. 355, the Supreme Court of Utah, considered the payment of mileage in relation to "salary" or "compensation." The court in that case set a dividing line as to when the payment of mileage becomes an addition to "salary" or "compensation" in the following language, 91 Pac., l.c. 358:

"By reference to 7 Words and Phrases, p. 6287 et seq., under the title 'Salary,' it will be seen that the term 'salary' may be and is variously applied. It is usually used as

Honorable Frederick Steck

designating recompense, reward, or compensation for services rendered. Mileage may become a part of compensation. If the mileage allowance is limited to the amount actually expended in traveling, then it cannot, of course, add anything to the income of the recipient of the salary. But, if the mileage is not so limited, as where a certain amount is allowed for each mile traveled and this amount exceeds the actual mileage charged, then the balance above such charge becomes a part of the official income or compensation the same as though it were a part of the salary. As a concrete proposition, it is not controlling that such accretions to official compensation are not designated as salary. It is not unusual, as is generally known, to allow large mileage to eke out the compensation of officers. It can make no difference in principle, however, whether the mileage allowance be much or little above the actual charge, so long as it is not limited to the actual cost of mileage, but is fixed by a round sum per mile. In such event the portion of unexpended mileage may be added to the compensation, and hence may be intended as a part of the compensation. * * *"
(Emphasis ours.)

Perhaps the most important Missouri case differentiating "expenses" from "compensation" as to county officers is Rinehart v. Howell County, 348 Mo. 421, 153 S.W.2d 381. In that case the Missouri Supreme Court took recognition of the fact that outlays for expenditures, as differentiated from compensation could be allowed a county officer, even where there is no statutory provision for reimbursement. We quote 153 S.W. 2d, 1.c. 382:

"[3] So far as presented for review, the record, viewed in the light of the judgment for respondent, is to be considered as establishing that the expenditures for which respondent asked reimbursement were for indispensable outlays for stenographic services incurred in the discharge of his official duties. Appellant offered no evidence and its brief does not question the probative value of respondent's testimony tending to establish said fact. The case is to be distinguished from cases announcing the rule that officials may not receive compensation in addition to that authorized by law. * * *"

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Continuing after citation of Missouri authorities at l.c. 382, the court said:

"* * *Maxwell v. Andrew County, supra, involved, sufficient for the purposes here, charges asserted against the county by Maxwell, as sheriff for the use of his automobile 'on calls.' Maxwell testified he attempted to keep the charges within \$75 a month. There was no attempt to justify them on the basis of actual outlays bona fide expended or even mileage. This resulted in the case being discussed on the theory said officer sought compensation in addition to that specifically provided by law. We also mention that General Assembly had specified the instances in which compensation to said sheriff for mileage was allowable and, so far as there involved, in Sec. 13415, R.S. 1939, Mo. St. Ann. p. 7017, Sec. 11793, had expressly prohibited 'fees for any other services than those in the two preceding sections enumerated.' Nodaway County v. Kidder, 344 Mo. 795, 129 S.W. 2d 857, likewise involved income and did not involve bona fide outlays. The instant case was submitted on the theory, as disclosed by the stipulated facts and undisputed testimony, that the outlays, as contradistinguished from income, were bona fide, reasonable and actual expenditures for indispensable expenses of the office by respondent (not on the theory that compensation to an officer was involved) and falls within the ruling in Ewing v. Vernon County, 216 Mo. 681, 695, 116 S.W. 518, 522(b). That case quoted with approval a passage from 23 Am. and Eng. Ency. Law, 2d Ed., 388, to the effect that prohibitions against increasing the compensation of officers do not apply to expenses for fuel, clerk hire, stationery, lights and other office accessories and held a recorder entitled to reimbursement for outlays for necessary janitor service and stamps, stating: "Fees are the income of an office. Outlays inherently differ. An officer's pocket in no way resembles the widow's cruse of oil. Therefore those statutes relating to fees to an income, and the decisions of this court strictly construing those statutes, have nothing to do with this case relating to outgo." (Emphasis ours.)

For other similar pronouncements by Missouri courts see Macon County v. Williams, 284 Mo. 447, 224 S.W. 835; Bradford v. Phelps County, 357 Mo. 830, 210 S.W.2d 996; Miller v. Webster County, Mo. Sup., 228 S.W. 2d 706.

Honorable Frederick Steck

One recognizable factor emerges from these cases, i.e., a county officer may be reimbursed in such a situation for his actual expenses or outlays, but to receive more than his actual expenses enters the realm of being an increase in his salary or compensation. Accordingly the county should reimburse this office for his actual expenses and may do so with a per mile basis as it chooses, provided, however, that if paid on a per-mile basis, it must not exceed his actual expenses.

CONCLUSION

Therefore, it is the opinion of this office that the county has a duty to reimburse the treasurer for his actual expenses in making bank deposits where there are one or more county depositories located outside the county seat. The county court may provide reimbursement either on an actual-expense basis or a per-mile basis, but the amount paid must not exceed the treasurer's actual expense in making deposits.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Jerry B. Buxton.

Very truly yours,

John M. Dalton
Attorney General

JBB:mw:gm

STATE REPRESENTATIVE:
QUALIFICATIONS:
NOT REQUIRED TO BE TAXPAYER:

Article III, Sec. 4, Constitution of Missouri, 1945, and Section 21.080, RSMo Cum. Supp. 1957, providing qualifications of state representatives do not require that one shall have paid a county tax in the county of his residence prior to his election to be eligible to said office.



May 6, 1960

Honorable Lee C. Sutton
State Representative
Monroe County
606 Missouri Avenue
Columbia, Missouri

Dear Mr. Sutton:

This office is in receipt of your request for a legal opinion, which reads, in part, as follows:

"Does a person who runs for, and if elected, to any office, namely the Representative's Office to the Missouri State Legislature, have to have his or her name entered upon the County Tax Roll and pay a County tax to the County in which this said person is running for or already holding the said State Representative's Office?"

We construe your inquiry to be whether or not one of the legal qualifications one must possess to be eligible to the office of state representative is that he shall have paid a county tax in the county of his residence prior to his election.

While the inquiry does not so state, it will be assumed for the purposes of our discussion herein, that said inquiry refers to the payment of real or personal property taxes within the county of his residence by the representative-elect of such county, a certain period of time, for example, twelve months next before the election of such person to said office. In this connection we direct your attention to Article IV, Section 4, Constitution of Missouri, 1875, which provided the qualifications of members of the Missouri House of Representatives at the time said Constitution was in effect and which reads as follows:

"No person shall be a member of the House of Representatives who shall not have attained the age of twenty-four years, who shall not be a male citizen of the United States, who shall not have been a qualified voter of this State two years, and an

Honorable Lee C. Sutton

inhabitant of the county or district which he may be chosen to represent one year next before the day of his election, if such county or district shall have been so long established, but if not, then of the county or district from which the same shall have been taken, and who shall not have paid a State and county tax within one year next preceding the election."

Article III, Section 4, Constitution of Missouri, 1945, and Section 21.080, RSMo Cum. Supp., 1957, provide the present qualifications of representatives.

Article III, Section 4, Constitution of Missouri, 1945, reads as follows:

"Each representative shall be twenty-four years of age, and next before the day of his election shall have been a qualified voter for two years and a resident of the county or district which he is chosen to represent for one year, if such county or district shall have been so long established, and if not, then of the county or district from which the same shall have been taken."

Section 21.080, RSMo Cum. Supp., 1957, reads as follows:

"Each representative shall be twenty-four years of age, and next before the day of his election shall have been a qualified voter for two years and a resident of the county or district which he is chosen to represent for one year, if such county or district shall have been so long established, and if not then of the county or district from which the same shall have been taken."

It is noted from the above quoted provision of the former Constitution that among other qualifications therein provided, no person could be a member of the House of Representatives "who shall not have paid a state and county tax within one year next preceding the election." Upon comparison of said section with Article III, Section 4 of the present Constitution and Section 21.080, supra, it is readily seen that the qualifications as to the payment of taxes have been omitted from the latter constitutional, and statutory provisions by the lawmakers; and do not now constitute one of the qualifications of the office of representative.

Therefore, because of such omission from Article III, Section

Honorable Lee C. Sutton

4, Constitution of Missouri, 1945, and Section 21.080 setting out the qualifications of state representatives, and in answer to your inquiry it is our thought that one is not required to have paid a county tax in the county of his residence prior to his election to be eligible to the office of state representative.

CONCLUSION

Therefore, it is the opinion of this office that Article III, Section 4, Constitution of Missouri, 1945, and Section 21.080, RS Mo. Cum. Supp., 1957, providing the qualifications of state representatives, do not require that one shall have paid a county tax in the county of his residence, prior to his election, to be eligible to the office of state representative.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,

John M. Dalton
Attorney General

PNC:aw

VOLUNTARY DISSOLUTION
OF CORPORATION :

A corporation seeking dissolution under Section 351.460, RSMo 1949, may be permitted to dissolve without compliance with Sections 351.125 and 351.135, RSMo 1949, if the corporation has not registered and made the affidavit required by these sections.

January 12, 1960



Honorable Walter Toberman
Secretary of State
Capitol Building
Jefferson City, Missouri

Dear Mr. Toberman:

Your request for an official opinion reads:

"This Department has customarily required corporations seeking to dissolve on or after July 1 pursuant to Section 351.460 et seq., RS Mo. 1949, to file the annual registration report and anti-trust affidavit required by Sections 351.120 and 351.135 and to pay the fees provided for in Section 351.125 and 351.135.

"Articles of Dissolution of a corporation, dated July 30, 1959, were received in this office on July 31, 1959. The corporation, through its attorney, has refused to file the 1959 report and affidavit and has refused to pay the fees therefor, which now total \$15.00.

"Is this Department correct in requiring the corporation to file the annual registration report and anti-trust affidavit and remit the \$15.00 fee now due as a condition precedent to dissolution?"

You state that the corporation in question seeks to dissolve under the provisions of Section 351.460, et seq., RSMo 1949, which reads:

Honorable Walter Toberman

"A corporation may be voluntarily dissolved by the written consent of the holders of record of all its outstanding shares in the following manner coupled with compliance with the provisions of sections 351.470 to 351.480: Upon the execution of such written consent by all the shareholders of record, articles of dissolution shall be executed in duplicate by the corporation by its president or a vice-president, and verified by him, and the corporate seal shall be thereto affixed, attested by its secretary or assistant secretary, which shall set forth and contain

- (1) The name of the corporation;
- (2) The names and respective addresses, including street and number, if any, of its officers and directors;
- (3) The agreement signed by all shareholders of record of the corporation consenting to its dissolution;
- (4) That such agreement is signed by all shareholders of record of the corporation or signed in their names by their attorneys thereunto duly authorized."

It will be noted that the above section holds that a corporation may be voluntarily dissolved upon compliance with the provisions of Sections 351.470 to 351.480. Section 351.470 requires that the articles of dissolution be delivered to the Secretary of State for filing. It is conceded that this was done. Section 351.480 reads:

"1. Such articles of liquidation in duplicate shall be delivered to the secretary of state. If the secretary of state finds that such articles of liquidation conform to law, he shall, when all taxes, fees, and charges have been paid as in this chapter prescribed, file the same keeping one copy as a permanent record. He shall thereupon issue a certificate of dissolution and a certified copy of such certificate attached to the other copy of said articles of liquidation,

Honorable Walter Toberman

and deliver the same to the corporation or its representative who shall then cause the articles of liquidation and the certified copy of said certificate of dissolution attached thereto to be filed for record in the office of the recorder of deeds of the county or city in which the registered office of the corporation in this state is located.

"2. Upon the issuance of such certificate of dissolution the existence of the corporation shall cease." (Emphasis ours.)

It would seem that the issue here is whether the fees prescribed in Section 351.125, RSMo 1949, and Section 351.135, RSMo 1949, are such fees as are contemplated in Section 351.480, supra.

Section 351.125, supra, reads:

"Every corporation required to register under the provisions of this chapter shall pay to the state a fee of five dollars for annual registration if it registers within thirty days from the first day of July, and any such corporation which registers on August first or during thirty days thereafter shall pay a fee of ten dollars, and any such corporation which registers on September first or during twenty-nine days thereafter shall pay a fee of twenty dollars, and any such corporation which registers October first or thirty days thereafter shall pay a fee of twenty-five dollars, and any such corporation which registers November first or twenty-nine days thereafter shall pay a fee of thirty dollars, and any such corporation which registers December first or thirty days thereafter shall pay a fee of thirty-five dollars for annual registration."

Section 351.135, supra, reads:

"Every corporation required to register under section 351.120 shall annually at the time of its registration as required in said section

Honorable Walter Toberman

make and file with the secretary of state on a form to be supplied by the secretary of state, the affidavit required by section 416.200, RSMo 1949, and pay a fee of five dollars in connection with the filing of such affidavit."

It will be noted that Section 351.125, supra, requires the corporation to pay a five dollar fee for annual registration "if it registers," and that Section 351.135, supra, requires a corporation to file annually at the time of registration an anti-trust affidavit and pay a fee of five dollars "in connection with the filing of such affidavit." From the above it is clear that no obligation is incurred for the payment of these fees unless and until the corporation registers and files an anti-trust affidavit. Thus, it is clear that in the instant case these were not fees embraced by Section 351.480, supra, because, as we have seen, fees provided for by Section 351.125, supra, and Section 351.135, supra, are not due and owing unless the corporation registers and files the anti-trust affidavit, which was not done in the instant case.

We also note that the registration and anti-trust affidavits are required during the month of July, but if they are not filed on or before the 31st day of December, the penalty for failure to do so is involuntary dissolution. Section 351.525.

Section 351.520, entitled "Dissolution and retirement of corporation, conditions of," reads:

"No corporation organized under the laws of this state shall, after March twentieth, in any year, be permitted to dissolve by any method, provided by law, unless it shall be shown to the secretary of state that it has filed the reports called for in sections 147.010 to 147.110, RSMo 1949, and has paid to the state collector of revenue any tax due upon said report. When the dissolution is to be effected by a proceeding in court, the judgment of dissolution shall be conditioned upon and shall require the annual franchise tax report to be made and the tax to be paid before the same is effective. No corporation, not organized under the laws of this state and engaged in business in this

Honorable Walter Toberman

state, shall, after March twentieth, in any year, be permitted to retire from this state by any method provided by law, unless it shall be shown to the secretary of state that it has filed the reports called for in sections 147.010 to 147.110, RSMo 1949, and shall have paid to the department of revenue any tax due upon said report."

It will be noted that the above section states that no corporation organized under the laws of this state shall, after March 20th in any year, be permitted to dissolve unless it shall be shown that it has filed the reports called for in Section 147.010 to Section 147.110 and paid any tax due thereon. These sections relate to corporation franchise tax. It is conceded that there has been compliance with these provisions of the law. We note also that failure to comply with Sections 351.525 and 416.200, RSMo 1949, will result in forfeiture of charter.

CONCLUSION

It is the opinion of this department that a corporation seeking dissolution under Section 351.460, RSMo 1949, may be permitted to dissolve without compliance with Sections 351.125 and 351.135, supra, if the corporation has not registered and made the affidavit required by these sections.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:ar;ml

COUNTY TREASURER:
TOWNSHIP FORM OF
ORGANIZATION:

A sheriff in a third class county under the township form of organization is eligible to be elected to the office of county treasurer.

June 20, 1960



Honorable Alvin Walker
Prosecuting Attorney
Mercer County
Princeton, Missouri

Dear Mr. Walker:

Your recent request for an official opinion reads:

"Your opinion is respectfully requested relative to the eligibility of a Sheriff in a County of the Third Class with the Township Form of government to the office of County Treasurer.

"As you are aware, Section 54.040 prohibits a Sheriff from seeking the office of Treasurer. However, in view of the reasoning in the case of State ex inf. Noblet we rel. McDonald v. Moore, 152 SW 2d 86 it would appear that where a county is organized under the Township form of government the Sheriff would be eligible in view of the liberal construction accorded under the law. The Sheriff in such a county would cease to be Sheriff on the last day of the year and would make final settlement with the present Treasurer on that date. If elected, such person would not take office until the following April, consequently would not be Sheriff for a period of over three months prior to taking office as Treasurer.

"Under the circumstances, your considered opinion would be greatly appreciated, for which please accept my thanks in advance."

Section 54.040, RSMo 1949, to which you refer reads:

Honorable Alvin Walker

"No sheriff, marshall, clerk or collector, or the deputy of any such officer, shall be eligible to the office of treasurer of any county."

We note the case of State v. Moore, 152 SW2d 86, to which you also refer. This was a case which involved Nodaway County, a county which, like Mercer, is a third class county with a township form of governmental organization. In that case the respondent, Mattie E. Moore, was elected, in 1939, township collector of Polk township in Nodaway County, for a two-year term expiring March 28, 1941. She was the nominee of her party for county treasurer at the general election in 1940, and was elected for a term to begin April 1, 1941. She furnished the proper bond, which was approved, and received her commission for the office. There were brought proceedings in quo warranto against her by the prosecuting attorney of Nodaway County to oust her from the office of county treasurer. The contention of the state was bottomed upon Section 13799, RSMo 1939, which is now Section 54.040, supra.

At the beginning of its consideration of this matter the Supreme Court of Missouri en Banc observes (l.c. 87):

"At the outset we should observe that statutes prescribing requirements of eligibility to an elective office must be given a liberal construction. This is so because in our democratic form of government the greatest possible freedom of choice in the selection of their officers is a natural right of the people and this right must be zealously guarded by the courts. * * *"

The court further stated that the case of the state rested solely upon the case of State ex rel. McAllister v. Dunn, 277 Mo. 38, 209 SW 110. In regard to that case the court observed (l.c. 87 [2]):

"That case was also an action in quo warranto involving the same statute. The respondent in that case had been a deputy collector of the City of St. Louis and while such he was elected city treasurer. It was contended that he was ineligible to hold such office in view of the prohibition of the statute. It was conceded that the statute was applicable to officers of the City of St. Louis as county officers because of the classification of St. Louis as a county rather than a city. We held that respondent was ineligible to the office of treasurer and ousted

Honorable Alvin Walker

him on the sole ground that the purpose of the statute was to obviate the situation where 'one could be chosen treasurer and take and hold the office when, in all probability, public money in his hands in his former official capacity would have to be received and receipted for by himself in his new official capacity.'

"In considering this finding as to the purpose of the statute it must be borne in mind that a county treasurer ordinarily takes office on the first day of January, Sec. 13792, R.S. 1939, Mo.St. Ann. §12130c, p. 6437, and that the term of a county collector extends beyond this date and does not expire until the first Monday in March, Sec. 11073, R.S. 1939, Mo.St. Ann. §9902, p. 7960. Under these circumstances a county collector, to take the office of treasurer, would have to resign as collector before his term was over and before the time for his final settlement which might give rise to the very situation we held the statute intended to avoid. The same situation could have arisen at the time of the original enactment of the statute, although the precise limitations of the terms of the various offices were not then specified in every instance.

"On the other hand the statute prescribing the term of a county treasurer in the cases of counties under township organization is different from the one governing counties not under township organization. In the case of the former the commencement of the term is postponed from January 1 to April 1. As a result the term of respondent in this case as county treasurer did not commence until after the expiration of her term as township collector. The term of the latter office expired on March 28, by which time her final settlement was required to be and was made, and was approved by the county court. Her duties and responsibilities as township collector were entirely concluded before the commencement of her term as county treasurer on April 1. In view of this difference in the facts of this case our decision in *State ex rel. McAllister v. Dunn*, neither gives support to relator's contention nor is controlling."

The conclusion of the court was (1.c. 88[3]):

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"* * *Therefore, respondent is not ineligible to the office of county treasurer because she held the office of township collector and having been duly elected county treasurer she is entitled to retain the office. * * *"

We do believe that the instant case comes within the purview of the Moore case and that the situation which the statute (54.040) seeks to avoid, to-wit: the handling as treasurer of public money which he had received in his former official capacity as sheriff would not exist. It is made clear by the Moore case that the avoidance of such a situation is the sole purpose and intent of the statute. The Moore case held that under the circumstances in that case this situation could not arise and that, therefore, the statute did not apply. The same situation lies in the instant case, as you point out.

Section 57.150, RSMo 1949, reads:

"Whenever the term of office of any sheriff shall expire, it shall be the duty of said sheriff to turn over to his successor in office all money in his hands due any party to a partition suit, either plaintiff or defendant, all money due guardians ad litem or attorneys, and all money due any witness, juror, constable, magistrate, circuit clerk, county clerk, judge of probate, sheriff or coroner, or due any one who has formerly held any one of said offices. The fees due for paying out any such fees or money shall thereupon be due to the sheriff receiving such fees or money. The sheriff receiving such fees or receiving money due any party to a partition suit, or due any guardian ad litem or attorney, and the securities on said sheriff's bond, shall be liable for the payment of said money to the person or persons entitled thereto, or for the payment of the same to the county treasurer, or the state treasurer, as is now provided by law."

It will be noted that the above section requires a sheriff to make a final settlement and turn over all funds in his hands when his term expires, which would be on December 31 of the last year of his term.

Section 54.030, RSMo, reads:

"In counties of classes three and four the qualified electors shall elect a county treasurer at the general election in the year 1950, and every four years thereafter, except

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that in those counties having adopted the township alternative form of county government the qualified electors shall elect a county treasurer at the November election in 1948, and every four years thereafter. The county treasurer so elected shall be commissioned by the county court of his county, shall enter upon the discharge of the duties of his office on the first day of January following his election, and shall hold his office for a term of four years and until his successor is elected and qualified unless sooner removed from office. In counties which have adopted the township alternative form of county government the treasurer's term shall extend until the first day of April next after the election of his successor."

From the above it will be noted that in township organization counties the county treasurer does not take office until the first day of April. Thus we note that there is a spread of three months between the time that the sheriff who has been elected county treasurer ends his term as sheriff before he begins his term as county treasurer. Since he is required to make final settlement on the last day of his term, which would be December 31, he would not as county treasurer have at his disposition any settlement of any moneys which he collected as sheriff.

We may further note that Section 57.160, RSMo 1949, holds that any outgoing sheriff who fails or refuses for sixty days following the expiration of his term to turn over to his successor in office any fee or money required to be turned over by the provisions of Section 57.150, supra, shall be liable on his bond for double the amount, and in addition shall be deemed guilty of a misdemeanor.

On the basis of the reasoning in the Moore case, which held that the treasurer elect could retain her office, we believe that the sheriff in the instant case would be eligible for election for the office of treasurer.

CONCLUSION.

It is the opinion of this department that a sheriff in a third class county under the township form of organization is eligible to be elected to the office of county treasurer.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

SCHOOLS: Limitation on submission of subsequent plan of reorganization applicable only to area within which vote was taken on previous plan, and not to remainder of county wherein no vote has been taken within one year.

January 29, 1960



Mr. Hubert Wheeler
Commissioner of Education
State Department of Education
Jefferson Building
Jefferson City, Missouri

Dear Sir:

This is in response to your request for opinion dated November 9, 1959, which reads as follows:

"Questions are often asked as to the frequency of presenting to the voters proposed enlarged school districts in various areas of the county by the county board of education. In some counties, Section 165.693 has been interpreted to mean that the one year limit refers to the last date that any reorganization plan was submitted in the county, while in other counties the limitations of this law seem to have been interpreted to refer merely to a previous election held in any particular or proposed area rather than to elections in other areas in the county. In other words, it is suggested by some that a subsequent reorganization election could be held within a proposed area so long as no election had been held in that specific area within a one year period although an election may have been held elsewhere in the county within that time.

"Section 165.673 provides in part that the county board of education shall make a comprehensive study of each school district in the county and prepare a plan of reorganization and submit such plan to the state board of education.

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"Section 165.693 provides for submitting a second plan and subsequent plans. Any subsequent plan shall be submitted to a vote in the same manner as other plans. The Attorney General, in his opinion of January 14, 1949, ruled that a plan of reorganization, to be submitted by the county board of education to the state board, must include all school districts in the county even though some districts are not to be enlarged. Therefore, any county plan must take into consideration all of the districts in the county.

"Section 165.677 provides that upon receipt of the county proposed reorganization plan the state board of education shall, within 60 days, examine and approve or disapprove such plan, either in whole or in part. If the state board finds the reorganization plan inadequate in whole or in part it shall return the plan to the county, indicating the parts which it has approved and listing reasons for finding any part of the plan not approved. The county board then has 60 days to review the rejected part of the plan in order to make alterations and return it to the state board for further consideration. If the revised plan of the part which was disapproved is again disapproved by the state board the county board shall propose and submit its own plan, or part, to the voters within 60 days following the disapproval of the revised plan.

"Section 165.680 requires the county board to submit to the voters of the district, within 60 days, any plan approved by the state board of education. Section 165.677 provides that when the county board of education proposes its own plan in accordance with the provisions of the law, it shall be submitted to the voters within 60 days following the receipt of the disapproval of the revised plan or part.

"You will observe that the state board of education may approve a proposed county plan in part and disapprove the remainder of the plan. When any part of the county plan is approved the law

directs that it shall be submitted to the voters within 60 days after it is approved by the state board. When the county board proposes its own plan as provided in the law, it may be considerably later than the state board's approval of the original plan, therefore, the elections could be held two or three months later than those of the part or parts approved by the state board.

"Section 165.677, referred to herein, makes provision for a county proposed plan to include the entire county but the state board of education has discretion in its examination of such plans and may approve only a part of the county proposed plan and disapprove the remainder, however, the county board, in submitting such a plan, may not propose the formation of new enlarged districts for each area of the county since some of the districts may have already been enlarged, or local conditions make it such that the county board may propose that certain districts remain the same as they exist at that time. Any area that is finally disapproved by the state board of education, the county board is authorized by law to submit its own plan from such disapproved areas, either covering all or part of such areas to be submitted to the voters. In proposing their own plans for the enlargement of districts, often county boards do not propose and submit to the voters all of the disapproved areas remaining in the county. Possibly only one or two proposals are submitted to the voters for certain specific areas. It frequently happens that with the changing of conditions, other areas not being submitted to the voters find it desirable to form enlarged districts even though the period of one year has not lapsed since the vote was taken in certain other proposed areas. If the one year limitation in Section 165.693 can be interpreted to apply to the holding of elections in any particular proposed district, rather than to elections in other areas of the county, it would help to expedite the calling of elections for the enlargement of school districts when certain

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areas of the county appear to be ready for such action.

"I shall appreciate your advice and official opinion in answer to the following question:

Presuming that any county board's plan, submitted to the state board includes all school districts in the county, even though some districts are not to be enlarged as directed in the Attorney General's opinion of January 14, 1949, does the one year limitation in submitting proposed enlarged districts to the voters by the county board of education apply in the limitation of such elections to a one year period from the last date on which the last vote for reorganization was taken within the county,

or

could this section be interpreted to mean that the one year limitation shall apply only to the particular territory in which an election was held rather than to elections in other areas of the county?"

The controlling statute involved in the determination of your question is Section 165.693, RSMo 1949, which reads as follows:

"In the event that any proposed enlarged district has not received the required majority affirmative vote, the school districts constituting the proposed new school district shall remain as they were prior to the election, but in all such cases the county board of education shall prepare another plan in the same manner as provided for the first plan and the second plan shall be submitted to a vote in like manner as the first, but not sooner than one year nor later than two years after the date of disapproval of the first plan. Any subsequent plan shall not be submitted sooner than one year following the date on which the last vote on reorganization was taken."

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The question arises out of the fact that this office has ruled that a plan of reorganization is a county-wide plan even though it might not propose the formation of enlarged districts in all the territory of the county. This must of necessity be true because in the preparation of such a plan of reorganization the county board of education must consider the whole county in order not to affect some area adversely by the formation of an enlarged district in some other part of the county. Therefore, in this sense, a plan of reorganization is a county plan.

However, this office has also ruled that such a plan of reorganization need be voted on only in the proposed enlarged districts (opinion to Weldon W. Moore, September 9, 1953).

In construing a statute, the prime duty is to give effect to the legislative intent as expressed in the statute. Remedial statutes are not in all events to be taken literally, but are to be interpreted so as to give effect to the legislative purpose, and to such purpose is to be ascribed a reasonable and not a technical meaning. *Warrington v. Bobb*, Mo. App., 56 SW2d 835.

Technically and strictly, when a plan of reorganization is considered as a county plan, the last sentence of Section 165.693, supra, prohibits the submission of a county plan sooner than one year following the date on which the last vote of reorganization was taken anywhere in the county. However, when this statute is read in the light of its apparent purpose and the general purpose of the reorganization laws, it acquires a different meaning.

As yet, no case in Missouri has been decided wherein the exact question involved here was determined. However, the general object and purpose of the reorganization laws and the time schedule set out therein were discussed in *State ex rel. Rogersville Reorganized School Dist. No. R-4 of Webster County v. Holmes*, 363 Mo. 760, 253 SW2d 402, 404. There, the court said:

"The object and purpose of the law is to effect a general reorganization of the school districts of this State. It should be liberally construed to the end that its ultimate objective may be attained. *State ex rel. Acom v. Hamlet*, supra, 250 S.W.2d loc. cit. 498. And especially should this be done where no contention is made that any public or private right has been impaired or injured by mere tardiness of action.

Mr. Hubert Wheeler

"It is readily apparent that the schedule was placed in the law primarily because the Legislature deemed a general reorganization of the school districts of this State to be of urgent need. But it was the need that prompted the urgency. No suggestion is made that the need became any the less subsequent to expiration of the schedule. Surely, therefore, the Legislature did not intend that a belated or tardy compliance with either of these two provisions of the schedule would be construed to defeat the end to be accomplished when both are so clearly intended to expedite rather than to abort the fulfillment of the need. * * *

In that case, reference was made to State ex inf. Rice ex rel. Allman v. Hawk, 360 Mo. 490, 228 SW2d 785, which, in turn, discussed and distinguished Schur v. Rural High School Dist No. 1, 112 Kan. 421, 210 P. 1105. The latter case involved a statute which authorized the formation of a rural high school district and contained a provision that an election for the formation of such a district "shall not be called oftener than once in every two years."

As stated above, the Missouri court, in the Hawk case, drew a distinction between that case and the one which it had under consideration involving the annexation statute, Section 165.300, RSMo, C.S. 1957, so that on its facts the Kansas case might or might not be persuasive. But, that is something which we need not decide now. The Kansas case did, however, set out the purpose of such a limitation. At P. 1.c. 1107 the court said:

"All that the two years' inhibition intended was to prevent the electors from being harassed with frequent elections on the same or substantially similar propositions."

It would appear that the Legislature had the same purpose in mind when it enacted the last sentence of Section 165.693, supra, i.e., to prevent the voters from being harassed with frequent elections on the same or substantially similar propositions. That being so, its purpose can be effectuated by construing it to mean that a plan for the formation of a particular enlarged district cannot be submitted sooner than one year following the date on which the last vote on formation of that proposed enlarged district was taken. It is not necessary,

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in order to effectuate this purpose, that it be construed technically so as to prohibit the formation of a proposed enlarged district in some other part of the county because the voters there will not have voted on the previous plan and are not harassed thereby.

In view of the declared over-all object and purpose of the reorganization laws as set out in the Holmes case, supra, and the urgent need for such reorganization, neither this nor any other statute should be strictly construed so as to hinder or unnecessarily delay the attainment of the ultimate objective, the general reorganization of the school districts of this state. If the last sentence of Section 165.693, supra, were construed so as to prevent the submission of a plan in a part of the county where no vote on reorganization had been taken within a year, it would unduly and unnecessarily restrict the expeditious fulfillment of the legislative purpose.

In disposing of this matter it should be pointed out that the decision in State ex inf. Rice ex rel. Allman v. Hawk, supra, is not controlling in this instance. That case construed Section 165.300, RSMo, C.S. 1957, the annexation statute. By its terms, and under the court's decision, after an annexation election has been held within a school district no other such special election shall be called within a period of two years thereafter. Although the court did not dwell on the point or actually consider the purpose of this limitation, its purpose is apparently the same as that in Section 165.693, supra, that is, to prevent the harassment of the voters. The court pointed out that Section 165.300 recognized only one purpose, the annexation of part or all of one district to another, and that, by its terms, it prohibited the calling of any such special election for that purpose within two years after an election on annexation. It should be noted that, regardless of the fact a proposition under Section 165.300 might be changed so as to propose the release of a different part of the district, the voters of the whole district vote thereon so that it is necessary to say that no election may be held under Section 165.300 within two years of a prior election thereunder in order to effectuate the purpose of preventing the harassment of voters. Consequently, our reasoning herein, considering the purpose of the limitations contained within the two statutes, is consistent with the decision of the court in the Hawk case.

CONCLUSION

It is therefore the opinion of this office that the limitation in the last sentence of Section 165.693, RSMo 1949,

Mr. Hubert Wheeler

prohibiting the submission of a subsequent plan of reorganization of school districts sooner than one year following the date on which the last vote on reorganization was taken, was designed to prevent the harassment of voters and, consequently, applies only to the area included within the limits of a proposed enlarged district wherein a vote was taken under a previous plan, and not to the remainder of the county where no vote has been taken within one year.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

SCHOOLS: Petition for change of boundary lines between
SCHOOL DISTRICTS: six-director districts must be signed by
qualified voters who come from and equal 10%
of the qualified voters of one of districts
affected and may originate in either district
affected thereby.

February 16, 1960

Mr. Hubert Wheeler
Commissioner of Education
State Department of Education
Jefferson Building
Jefferson City, Missouri



Dear Mr. Wheeler:

This is in response to your request for opinion dated
January 20, 1960, which reads as follows:

"Section 165.294 providing for the change
of boundary lines in six director school
districts was amended in 1959, 70th General
Assembly, by changing the part relating to
the petition. Since the publication of the
amended act, inquiries have come to this
Department for information about the appli-
cation of this law as it relates to the
petitioners of the district or districts
desiring the change of boundary. The ques-
tion at issue is whether the petitioners
must all live in one district or whether
part of the petitioners may reside in one
district and the remainder in another to be
affected by the change.

"For consideration of the inquiries about
the provisions of the amended law, the part
relating to the petition, reference is made
to the following laws:

"Section 165.293, repealed laws 1955, page
536, prior to its repeal provided in part
that all the provisions of Section 165.170
relating to the change of boundary lines of
common school districts shall apply to town,
city and consolidated districts.

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"Section 165.170 relating to the petition for change of boundary lines provided 'that the district clerk of each district affected, upon the receipt of a petition desiring such change, and signed by 10 qualified voters residing in any district affected thereby shall post a notice of such desired change in at least 5 public places in each district interested 15 days prior to the annual meeting, or by notice in all the newspapers for the same length of time.'

"In the case 103 SW 493 --- When the proposed change of boundary affects two or more districts the law does not require 10 petitioners from each district, but such petitioners may all reside in one district, or part of them may reside in one and the remainder in another to be affected by the change.

"In 1955 the General Assembly enacted Section 165.294 which provided for the change of boundary lines between six director school districts and repealed Section 165.293 which authorized six director districts to proceed under the common school district act in changing boundary lines.

"Section 165.294 as enacted in 1955, applicable only to six director districts, provided in the part relating to the petition that 'when it is necessary to change the boundary lines 10 qualified voters who are taxpayers in any district affected may petition the boards of education in the districts affected for a change of boundary lines. The secretaries of the school districts shall post notices of the desired change in at least 5 public places in each district affected at least 15 days prior to the annual school election, or publish notice for the same length of time in all the newspapers of the districts.'

"Section 165.294 was amended in 1959 so that the part relating to petitions now provides that 'when it is necessary to change boundary lines 10% of the qualified voters who are taxpayers in any district, as determined by the

Mr. Hubert Wheeler

total vote cast for county superintendent of schools in said district at the school election held on April 7, 1959 or succeeding elections, affected may petition the district boards in the districts affected for a change in boundaries. The secretaries of the district boards of education shall post a notice of the desired change in at least 5 public places in each district affected at least 15 days prior to the next annual school election, or publish notice for the same length of time in all the newspapers of the districts.'

"The Supreme Court (1907) in the case reported in 103 SW 493 ruled in the construction of the phrase 'voters in any district affected' that all the petitioners may reside in one district, or part of them may reside in one district and the remainder in another district to be affected.

"There seems to be no difficulty in applying the court's construction to Sections 165.170 and Section 165.394 prior to their amendment. The problem arises when trying to apply the court's construction to the provision of Section 165.294 as amended in 1959. The amended act is limited to 10% of the voters in any district (affected) as determined by the total vote cast in said district for the county superintendent of schools on April 7, 1959, or succeeding elections. The limiting phrase which provides 'as determined by the total vote cast in said district for the county superintendent of schools' is the part which makes it difficult to apply the court's construction of the law as ruled in the case reported in 103 SW 493.

"I shall be glad to have your advice and official opinion in answering the following questions:

1. Does the provision of Section 165.294 --- '10% of the qualified voters who are taxpayers in any district as determined by the total vote cast for county superintendent of schools in said district * * * affected may petition the district boards in the districts affected for a change in boundaries' --- apply to only one district or could the petitioners come from both districts affected?

Mr. Hubert Wheeler

2. If the petitions must come from only one district could it be from either district affected, or would the petition have to come from the district giving up the territory?

3. If the petitioners can come from both districts affected would this require 10% of the vote for county superintendent in each district, or in other words, would a valid petition require 10% of the total vote for county superintendent of schools in both districts affected by the change of boundary lines?"

Reduced to its essentials, Section 165.294, as amended by the 70th General Assembly, provides that 10% of the qualified voters in any district affected may petition for change of boundaries. The number of qualified voters in the district is to be determined from the number of votes cast for county superintendent of schools in said district. The petition may then be presented to the district boards in the districts affected.

By the use of the singular in referring to the source of the petition and the plural in authorizing the presentation of the petition to the boards of the districts affected, it is apparent that the Legislature intended that the petition could, and must, originate in one district and that the percentage requirement is applicable to that district, and not both. If it were meant to require 10% of the qualified voters in both districts, it would have used the words "districts affected" in referring thereto, not "any district affected" as it does.

The Legislature having changed the requirement from a flat number of ten qualified voters to a percentage of the voters in any district affected, the decision of the court in State ex rel. Rose v. Job, 205 Mo. 1, 103 SW 493, is no longer applicable. As the statute now reads, the petitioners must come from one district, which may be either district affected, and must equal 10% of the qualified voters therein.

CONCLUSION

It is the opinion of this office that a petition for change of boundaries between two six-director school districts must be signed by qualified voters who come from and equal 10% of the

Mr. Hubert Wheeler

qualified voters of one of the districts affected by the proposed change and that such petition may originate in either district affected thereby.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

COUNTY HOSPITALS: The premium on the bond of a county treasurer,
COUNTY TREASURER: which bond was required by the county court, to
BOND: secure moneys belonging to a county hospital
which are in his hands, may not be paid out of
the hospital money but must be paid from the general revenue fund
of the county.

April 6, 1960



Honorable Jay White
Prosecuting Attorney
Phelps County
Rolla, Missouri

Dear Mr. White:

Your recent request for an official opinion reads:

"The County Court of this county, Phelps County, County of the Third Class, has requested that I obtain your opinion regarding the permissive expenditure of the Phelps County Memorial Hospital.

"It appears that the hospital moneys in the hands of the County Treasurer must be bonded by law and this being a considerable amount of money, the bond's premium is rather high. The County Court is desirous to know if it is permissive that the bond premium for the hospital money in the hands of the Treasurer be paid out of the hospital funds instead of the general county funds. Section 205.190, RSMo 1949, would seem to be the section of law defining the control of expenditures of all moneys in the hospital funds. It was my thoughts that since the premium for this treasurer's bond was for the benefit of the hospital moneys that perhaps this section might be broad enough to permit the hospital board to make such an expenditure."

We wish to state, first, that this opinion is predicated upon the assumption that in this case the county court has required the county treasurer to secure a surety bond, because, unless it has done so, the county is not liable for the premiums. The department so held in an opinion rendered March 27, 1947, to W. C. Frank, Prosecuting Attorney, Kirksville, Missouri, a copy of which opinion is enclosed.

Honorable Jay White

The only question set forth by you is whether the premium on the bond which the county treasurer must give to secure the county hospital funds which he has in his possession may be paid out of those funds or must be paid out of the general revenue fund of the county.

We first note Section 54.070, RSMo 1949, which provides for the bond of the county treasurer. That section reads:

"The person elected or appointed county treasurer under the provisions of this chapter, shall, within ten days after his election or appointment as such, enter into a surety bond or bonds with a surety company or surety companies, authorized to do business in Missouri, to the county in a sum not less than twenty thousand dollars nor more than the highest amount of money held by the treasurer at any one time during the year prior to his election or appointment, to be fixed and approved by the county court, conditioned for the faithful performance of the duties of his office, and the cost of said bond shall be paid out of the general revenue fund of the county; provided, that the county treasurer in any county of the third class or fourth class may furnish either a personal bond or a surety bond and in case a surety bond is required by the county court in said county, said surety bond shall be paid for by said county."

It will be noted that the section provides that "the cost of said bond shall be paid out of the general revenue fund of the county."

We now turn to the law relating to county hospitals and note numbered paragraph 4 of Section 205.190, RSMo 1949, which reads:

"4. The board of hospital trustees shall make and adopt such bylaws, rules and regulations for their own guidance and for the government of the hospital as may be deemed expedient for the economic and equitable conduct thereof, not inconsistent with sections 205.160 to 205.340 and the ordinances of the city or town wherein such public hospital is located. They shall have the exclusive control of the expenditures of all moneys collected to the credit of the hospital fund, and of the purchase of site or

Honorable Jay White

sites, the purchase or construction of any hospital buildings, and of the supervision, care and custody of the grounds, rooms or buildings purchased, constructed, leased or set apart for that purpose; provided, that all moneys received for such hospital shall be deposited in the treasury of the county to the credit of the hospital fund, and paid out only upon warrants ordered drawn by the county court of said county upon the properly authenticated vouchers of the hospital board."

In regard to the above section, we note the case of State v. Holman, 293 SW 93. That case was engaged in the matter of construing the meaning of the above section, which at that time was Section 12.612, RSMo 1919. In regard to the matter of whether the county court, in disbursing county hospital funds, was in a position to exercise its discretion and judgment in the matter, the court stated (l.c. 97):

"As we view the law and the facts presented herein, we must conclude that the duty of the county court was purely ministerial; and it was the duty of the county court to issue the warrant upon the voucher of the board of trustees as presented. We find nothing convincing to the contrary in the citations of appellants."

From the above, it would clearly appear that the county court would not have the authority to expend county hospital funds to pay the premium on the treasurer's bond. Nor do we find anywhere in the law any authority residing in the hospital board of trustees to use any portion of the hospital funds for this purpose. In view of this absence and of the specific direction that the bond of the county treasurer is to be paid out of the general revenue fund, we do not believe that it can be paid from any other source.

CONCLUSION

It is the opinion of this department that the premium on the bond of a county treasurer, which bond was required by the county court, to secure moneys belonging to a county hospital which are in his hands, may not be paid out of the hospital money, but must be paid from the general revenue fund of the county

Honorable Jay White

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:ar
Enclosure

SCHOOLS:
STATE BOARD OF EDUCATION:
SCHOOL DISTRICTS:

The statutory provisions found within Section 165.677, RSMo Cum. Supp. 1957, which give the State Board of Education sixty days in which to consider county reorganization plans for school districts and return to the county board approved or disapproved,

are directory. These provisions are designed to expedite reorganization of school districts and tardy compliance does not invalidate the proceedings taken thereunder. However, it is incumbent upon the State Board to adhere to this schedule as nearly as practicable. Even though the provisions are directory, they are meant to be followed as closely as possible.

October 28, 1960

Honorable Hubert Wheeler
Commissioner of Education
Jefferson Building
Jefferson City, Missouri



Dear Mr. Wheeler:

This is in response to your request for opinion dated February 2, 1960. You conclude your letter with the following request:

"I shall be glad to have your advice and official opinion in answering the following questions:

1. Does the law which establishes a time schedule for the State Board of Education to examine, approve or disapprove proposed school district reorganization plans submitted by the county board of education apply in the same manner as the courts have ruled in relation to the time schedule for county boards?
2. Is the statute which regulates the time in which the State Board exercises its power in the examination, approval or disapproval of county board of education plans for reorganization of school districts to be considered directory and not mandatory? If directory, would the State Board's consideration and disposal of a county plan which went beyond the 60 days scheduled time be a valid act?"

Your first question and the first part of your second question will be handled together. Following this discussion I will answer the latter portion of question number 2.

Those statutes necessary for an understanding of the problem at hand are as follows:

Section 165.673, RSMo 1949:

"The county board of education, as provided for in sections 165.657 to 165.670 shall:

(1) Within six months after its organization, make or cause to be made and completed a comprehensive study of each school district of the county and prepare a plan of reorganization. Such study shall include:

(a) The assessed tax valuation of each existing district and the differences in such valuation under the proposed reorganization plan;

(b) The size, geographical features and the boundaries of the proposed enlarged districts;

(c) The number of pupils attending school, average daily attendance, and the population of the proposed enlarged districts;

(d) The location and conditions of school buildings and their accessibility to the pupils;

(e) The location and condition of roads, highways and natural barriers within the county;

(f) The high school facilities of the county and recommendations for improvement of same;

(g) The conditions affecting the welfare of the teachers and pupils;

(h) Any other factors concerning adequate facilities for the pupils.

(2) Upon completion of the comprehensive study, but not later than May 1, 1949, submit to the state board of education, a specific plan for the reorganization of the school districts of the county. Such plan shall be in writing and shall include such charts, maps and statistical information as are necessary to properly document the plan for the proposed reorganized districts.

(3) Continue to study the school system of

the county and propose subsequent reorganization plans as conditions warrant.

(4) Cooperate with boards of adjoining counties in the solution of common organization problems, and submit to the state board of education for final decision any and all organization questions on which the cooperating boards fail to agree.

(5) Approve the budget prepared by the county superintendent of schools in cooperation with the clerks of the boards of several districts and approve the audit, made by the county superintendent, of the expenditures report prepared by the district clerk and submitted for the approval of the state board of education.

(6) Continue to advise with the county superintendent of schools, school patrons, and school officials on all matters pertaining to the improvement of the schools in the county."
(Emphasis supplied.)

Section 165.677, RSMo Cum. Supp. 1957:

"Upon receipt of such reorganization plan, the state board of education shall examine such plan. The state board shall approve or disapprove such plan either in whole or in part. If the plan includes any proposed district with territory in more than one county, the board shall designate the county containing the greater portion of such proposed district based upon assessed valuation as the county to which such district shall belong. The secretary of the county board shall be notified of the state board's action within sixty days following receipt of the plan by the state board. If the state board finds that the reorganization plan is inadequate in whole or in part, it shall return the plan to the secretary of the county with a full statement indicating the parts thereof it has approved and its reasons for finding the plan or any part inadequate. The county board shall have sixty days to review the rejected plan or parts thereof, make alterations, amendments and revisions as may be deemed advisable and return the revised plan or part to the state

Honorable Hubert Wheeler

board for its action. If the revised plan or part is disapproved by the state board, the county board shall propose and submit its own plan or part to the voters within sixty days following receipt of disapproval of the revised plan or part. No enlarged district may be proposed or submitted without the approval of the state board unless such proposed district shall have a minimum of two hundred pupils in average daily attendance for the preceding year or is comprised of at least one hundred square miles of area. Such plan or part shall be submitted to the qualified voters in the same manner as if the plan or part had been approved by the state board. Nothing in sections 165.657 to 165.707 shall be construed as preventing the establishment and operation of more than one school in any enlarged district."

Thus we see that the State Board has sixty days to examine, approve or disapprove, in whole or in part, the county's plan. If the plan is disapproved the county board has sixty days in which to submit a revised plan. If this plan is also rejected, then the county board shall submit its own plan to the voters within sixty days. If the State Board should approve any reorganization plan, then Section 165.680, RSMo Cum. Supp. 1957, gives the county board sixty days to call an election. In the event that any plan of reorganization should fail at the polls, then the county board can resubmit a subsequent plan pursuant to certain time limitations found in Section 165.693, RSMo 1949.

State ex rel. Rogersville Reorganized School District No. R-4 of Webster County v. Holmes, 363 Mo. 760, 253 SW2d 402, interpreted certain portions of the above time schedule. The court held that the requirements of (1) submitting reorganized plans to the State Board not later than May 1, 1949 [Section 165.673(2)] and (2) submission of subsequent plans to the voters after a rejection at the polls should not be later than two years [Section 165.693], were only directory provisions and not mandatory. The failure to fully comply with these time limitations did not invalidate the organization and existence of the school districts involved.

The use of such slippery words as "mandatory" or "directory" by themselves is subject to severe limitations. It could even be said that these words describe the position a court has reached after interpreting a statute under a given set of facts. So the true meaning of these words is the analysis used to test the statutory language involved. In the Holmes case, the court said at 253 SW2d, 1.c. 404:

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"In determining whether either of the provisions of the schedule with which each relator failed to comply is mandatory or directory, the 'prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished. Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory.' 25 R.C.L. §14, pp. 766, 767."

The court also cited authorities for a general proposition of the law such as is found in 67 C.J.S., Officers, Sec. 114 (b), pp. 404-406:

"As a rule a statute prescribing the time within which public officers are required to perform an official act regarding the rights and duties of others, and enacted with a view to the proper, orderly and prompt conduct of business, is directory unless it denies the exercise of the power after such time, or the phraseology of the statute, or the nature of the act to be performed, and the consequences of doing or failing to do it at such time are such that the designation of time must be considered a limitation on the power of the officer. When the legislature prescribes the time when an official act is to be performed, the broad legislative purpose is to be considered in deciding whether the time prescribed is directory or mandatory. If the statute is mandatory there must be strict conformity, but if directory the legislative intention is to be complied with as nearly as practicable. So a statute requiring a public body, merely for the orderly transaction of business, to fix the time of performance of certain acts which may as effectually be done at any other time is usually regarded as directory." (Emphasis supplied).

The above quotation is cited with approval in part in Taney

County v. Empire District Electric Company, Mo. Sup., 309 SW2d 610. The Taney County case, the Holmes case, and many other Missouri decisions which have delved into the dichotomous discussion at hand, cite a leading authority on statutory interpretation. Sutherland, Statutory Construction, 3rd Ed. In Vol. 3, 1.c. 101-102, Sutherland says:

§5816. " * * * It is difficult to conceive of anything more absolute than a time limitation. And yet, for obvious reasons founded in fairness and justice, time provisions are often found to be directory merely, where a mandatory construction might do great injury to persons not at fault, as in a case where slight delay on the part of a public officer might prejudice private rights or the public interest. * * *

"For the reason that individuals or the public should not be made to suffer for the dereliction of public officers, provisions regulating the duties of public officers and specifying the time for their performance are in that regard generally directory. A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered a limitation of the power of the officer." (Emphasis supplied.)

These lengthy quotations have been included in this opinion to give meaning to the court's decision in the Holmes case when it said that certain portions of the time schedule for school district reorganization were "directory" rather than "mandatory."

This time schedule, the court said, was placed in the statutes because "the Legislature deemed a general reorganization of the school districts of this State to be of urgent need. But it was the need that prompted the urgency." And it was further stated that the Legislature never intended that a tardy compliance with those provisions of the schedule before the court "would be construed to defeat the end to be accomplished when both are so clearly intended to expedite rather than to abort the fulfillment of the need."

Honorable Hubert Wheeler

The Holmes case and State ex inf. Smoot, ex rel. Kugler v. Boyer, et al., Mo. Sup., 259 SW2d 375, explicitly state that the Legislature intended that schools were to be reorganized, under the provisions set out above in years to come, regardless of the fact that the calendar schedule in the statute had expired (first Tuesday in November, 1949). Thus, the logic of these cases can be used today. To reach a solution to the question raised in your opinion request we must equate the time schedule for State Board action to the same plane and parallel to that schedule set up for the county board. It is certainly difficult to explain why the two should be treated differently. The "need" of school district reorganization would apply equally to one board as to the other. Tardy compliance by the State Board could not reasonably be permitted to defeat the over-all objective of reorganization. Surely the State Board's inability to meet and act upon a reorganizational plan within the prescribed sixty-day period could not defeat that plan and cause injury to the public. It is my view, therefore, that the time schedule prescribing the time within which the State Board shall examine and approve or disapprove a reorganizational plan is directory and "intended to expedite rather than to abort the fulfillment of the need" for reorganization.

In answering your second question it might be accurate to state that the true distinction between a directory or mandatory provision is that late compliance is valid in one situation while invalid in another. Thus, if we say that the time schedule under discussion is directory, we are inferentially stating that tardy compliance is effective. However, it cannot be too strongly emphasized that regardless of the conclusion that the time schedule at hand is directory, the State Board is still required to adhere to this schedule as nearly as practicable.

In 82 C.J.S., Statutes, §374, p. 869, it is stated that " * * * While noncompliance with a directory provision of a statute does not invalidate a proceeding, there is nevertheless a duty to comply even with purely directory provisions, as nearly as practicable, * * * " This same theory was mentioned in School District No. 40 v. Board of County Commissioners of Clark County, 155 Kan. 636, 127 P2d 418, 420 [1], when the court said that if a statute is directory "the legislative intention is to be complied with as nearly as practicable." This same court said in an earlier case, " * * * While a directory provision should be obeyed, an act done in disobedience of it may still be valid. * * * " Hooper v. McNaughton, 113 Kan. 405, 214 P 613, 614 [1]. The basic premise that directory provisions are not intended by the Legislature to be wholly disregarded appears in 25 R.C.L., §14, p. 767 and has been adopted as a proper expression of the law in Baltimore Paint & C. Works vs. Automotive Electric & Parts Co., 173 Md. 210, 195

Honorable Hubert Wheeler

A 558, 560 [5]; State vs. Consolidated School District No. 4C, 358 Mo. 839, 217 SW2d 500, 502 [4]; and State vs. Brown, 326 Mo. 627, 33 SW2d 104, 106 [2-6]. This basic statement is further elaborated in 50 Am. Jur., Statutes, §20, p. 43. It says there that " * * * while the consequences of the violation of a directory statute may be a judicial question to be decided in accordance with the excusatory or explanatory facts and circumstances attending the violation, in the absence of any such fact, the direction of the statute will ordinarily be followed where it is plain and explicit and is consistent with the established practice and policy of the court dealing with the question." The consequences of determining whether a statute is mandatory or directory was recognized in Borough of Pleasant Hills vs. Carroll, 182 Pa. Super. 102, 125 A2d 466, 469 [3]. The court said that, "To hold that a provision is directory rather than mandatory does not mean that it is optional--to be ignored at will. Both mandatory and directory provisions of the legislature are meant to be followed."

CONCLUSION

It is therefore the official opinion of this office that the statutory provisions found within Section 165.677, RSMo Cum. Supp. 1957, which give the State Board of Education sixty days in which to consider county reorganization plans for school districts and return to the county board approved or disapproved, are directory. These provisions are designed to expedite reorganization of school districts and tardy compliance does not invalidate the proceedings taken thereunder.

However, it is incumbent upon the State Board to adhere to this schedule as nearly as practicable. Even though the provisions are directory, they are meant to be followed as closely as possible.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Eugene G. Bushmann.

Yours very truly,

JOHN M. DALTON
Attorney General

EGB/mlw

VOTING:
VOTERS:
VOTER REGISTRATION:
REGISTRATION:
COUNTY COURT:
ELECTIONS:

A proposition for the adoption of county registration of voters under Chapter 114 V.A.M.S. is to be submitted to the voters for a vote on such proposition at the next general election occurring more than 30 days after the petition is presented to the county court.

May 25, 1960

Honorable Robert P. C. Wilson, III
Prosecuting Attorney
Platte County
Platte City, Missouri



Dear Mr. Wilson:

This is in response to your request of May 5, 1960, for an opinion, which request reads as follows:

"I request the opinion of your office in regard to interpretation of Section 1. 1., House Bill No. 127, as enacted by the 70th General Assembly. Section 1. 1. of that reads as follows

"Section 1. 1. 'Upon the filing of a petition signed by fifteen per cent or more of the qualified voters of any county and presented to the county court at any regular or special session thereof more than thirty days before any general election to be held in the county, the county court shall order the question, as to whether or not there should be adopted the law requiring a registration of the qualified voters of the county, submitted to the qualified voters, to be voted upon at the next election.'

"Under the above Act, a Petition was filed in the County Court of Platte County, Missouri on January 21, 1960, the Petition bearing the signatures of more than fifteen per cent of the qualified voters of the county. The question which I raise is whether the proposition should be submitted at the forthcoming Primary election, or whether it should be submitted at the forthcoming General Election."

Honorable Robert P. C. Wilson, III

House Bill No. 127, 70th General Assembly, which became effective August 29, 1959, may be found in Sections 114.010 to 114.240, inclusive, VAMS. That portion of House Bill No. 127, which you set out in your request, has been designated Section 114.010(1) and the answer to your inquiry depends upon the construction placed upon the use of the words "general election" and "next election" as found in said section.

Section 1.020, RSMo Cum. Supp., 1957, reads, in part, as follows:

"As used in the statutory laws of this state, unless otherwise specially provided or unless plainly repugnant to the intent of the legislature or to the context thereof:"

"(3) 'General election' means the election required to be held on the Tuesday succeeding the first Monday of November, biennially;"

In view of the definition contained in Section 1.020, supra, it can only be concluded that the words "general election," as used in Section 114.010(1), supra, refer to the election held every two years on the first Tuesday after the first Monday in November.

We have noted that the statute does not specify that the proposition shall be submitted at the next general election but, instead, it only requires that it be submitted at the next election. However, we believe that as the general election has been used as a basis for determining the cut-off date for presenting the petition to the county court, it becomes necessary to read the word "general" into the last part of paragraph 1 between the words "next" and "election." The general rule of statutory construction is that in the absence of express restriction, it may be assumed that a term is used throughout a statute in the same sense in which it is first defined. 50 Am. Jur. 255.

In view of the foregoing, it is our opinion that a proposition of county registration of voters under Chapter 114, VAMS, is to be submitted to the voters for a vote on such proposition at the next general election held more than thirty days after the petition is presented to the county court which, under the set of facts outlined in your request, would be the general election to be held in November, 1960. To hold that the Legislature actually meant for the proposition to be submitted at the next election, in time, held following the submission of the petition instead of at the next general election could conceivably lead

Honorable Robert P. C. Wilson, III

to problems of major proportions. For example, it would be possible for a petition to be submitted to the county court one day before the primary election, which would be more than thirty days before the general election, and if it were held that the words "next election" means the next election in time, the court would be required to submit the proposition at the election held the day following presentation of the petition.

CONCLUSION

Therefore, it is the opinion of this department that a proposition for the adoption of county registration of voters under Chapter 114, VARS, is to be submitted to the voters for a vote on such proposition at the next general election occurring more than thirty days after the petition is presented to the county court.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Calvin K. Hamilton.

Yours very truly,

John M. Dalton
Attorney General

WMS:alm:ew

JOHNSON GRASS: (1) In counties with township organization it would
TOWNSHIP COUNTIES: be the responsibility of the township to control
TAXATION: Johnson grass on the right of ways which are owned,
occupied or controlled by those individual townships;
(2) Townships in counties under township organization declared a
Johnson grass extermination area, authorized by Section 263.265, V.A.M.S.
1959 to levy upon all property subject to their authority a tax in an
amount not to exceed five cents on each \$100 assessed valuation, for
the purposes of this act, are of necessity the governing body which
determines the amount of that tax to be levied within the maximum
allowed.

August 31, 1960

Honorable J. S. Williamson
Commissioner of Agriculture
Jefferson Building
Jefferson City, Missouri



Dear Mr. Williamson:

This is in response to your letter of May 10, 1960, in which,
in referring to Sections 263.255 through 263.267, RSMo Cum. Supp.
1957, you ask the following questions:

"In your opinion, in counties with township
organization, would the county court be
responsible for the control of Johnson grass
on county right of ways or would it be the
responsibility of the township organization?

"Secondly, does the law permit individual
townships to decide the amount, if any, of
tax to levy under the purposes of the law.
We cite the following situation as an
example: A county has elected to enforce
the law, but this county, being under a
township organization has certain township
boards that refuse to levy a tax saying that
Johnson grass is no problem in that particular
township.

"Our question, is this possible under the law?"

In answer to your first question, we direct your attention to
Section 263.261, RSMo Cum. Supp. 1957, which we quote:

"It shall be the duty of public utilities,
the state highway department, the county
court, railroads, drainage districts, town-
ship boards, special road districts and other
public and quasi-public corporations and every
land owner in Johnson grass extermination areas:

Honorable J. S. Williamson

(1) To control and eradicate Johnson grass and to prevent its regrowth and reinfestation on all lands, right of ways and easements owned, occupied or controlled by them;

(2) To employ methods of control and eradication and for the prevention of the regrowth and reinfestation of Johnson grass as directed by the commissioner of agriculture or the county weed control board;

(3) To comply with all orders, rules and regulations promulgated by the commissioner of agriculture pursuant to the provisions of sections 263.255 to 263.267."

From Section 263.261 you will note that the control and eradication of Johnson grass and the prevention of its regrowth and reinfestation is the responsibility of the specific political subdivisions which control or own the lands, right of ways and easements upon which the Johnson grass is found. It would seem logical to conclude from this section that a township board is supposed to control and eradicate the Johnson grass on the lands and right of ways which that township owns, occupies or controls by virtue of its township form of government, and that a county court would control and eradicate Johnson grass on all lands and right of ways owned, occupied or controlled by a county not under township organization.

Section 263.265, V.A.M.S. 1959, reads as follows:

"The county court, township board and special road district of any county declared a Johnson grass extermination area, in addition to any and all taxing powers which it may possess shall be authorized to levy upon all property subject to its authority a tax in an amount not to exceed five cents on each one hundred dollars assessed valuation, for the purpose of paying the expenses of the county weed control board or the agent of the board in making the inspection required under the provisions of section 263.259, and for the expense of controlling and eradicating Johnson grass on county roads and right of ways, provided that not more than twenty-

Honorable J. S. Williamson

five per cent of the taxes so levied and collected shall be used for administrative purposes. The cost of control and eradication of Johnson grass on all lands and highways owned or supervised by the state highway department shall be paid by the highway department out of funds appropriated for its use."

In answer to your second question you will see that Section 263.265, supra, authorizes the county court, township board, and a special road district of any county declared a Johnson grass extermination area to levy upon all property subject to their authority a tax in an amount not to exceed five cents on each \$100.00 assessed valuation. Since it is the responsibility of these various political subdivisions to control and eradicate Johnson grass on all lands occupied or controlled by them, and since these specific political subdivisions are authorized to levy a tax not to exceed five cents for that purpose, it would be considered consistent with the purport of this law, and consistent with the general taxation laws to conclude that the political subdivision in question is to determine the amount, if any, of the tax to levy for the purpose of this law. The amount decided upon, would of necessity, be within the maximum allowed by Section 263.265, supra.

CONCLUSION

It is the opinion of this office that:

(1) In counties with township organization it would be the responsibility of the township to control Johnson grass on the right of ways which are owned, occupied or controlled by those individual townships.

(2) Townships in counties under township organization declared a Johnson grass extermination area, authorized by Section 263.265, V.A.M.S. 1959, to levy upon all property subject to their authority a tax in an amount not to exceed five cents on each \$100.00 assessed valuation, for the purposes of this act, are of necessity the governing body which determines the amount of that tax to be levied within the maximum allowed.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James B. Slusher.

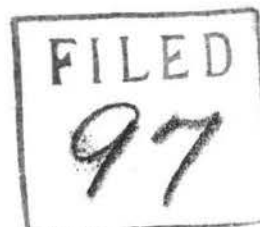
Yours very truly,

JOHN M. DALTON
Attorney General

JBS/mlw

PUBLIC ADMINISTRATOR: The public administrator may be appointed
INHERITANCE TAX APPRAISER: and serve as an inheritance tax appraiser
PROBATE COURT: of an estate pursuant to Section 145.150
and there is no incompatibility between
the duties of a public administrator and
a tax appraiser except in cases where the
public administrator is acting pursuant to
Sections 473.743 et seq.

September 9, 1960



Honorable Robert E. Wilson
Prosecuting Attorney
Polk County
Bolivar, Missouri

Dear Mr. Wilson:

This will acknowledge receipt of your recent letter in
which you ask for our official opinion on the following
question:

"I hereby request the opinion of your
office on the following question: May
the public administrator in a third or
fourth class county lawfully serve as
inheritance tax appraiser in estates
where he is not serving as the adminis-
trator, or is there a conflict of interest
in these two positions which would pre-
vent him from acting in the capacity of
inheritance tax appraiser in other
estates?"

Section 473.730, RSMo 1949, as amended, provides:

"Every county in this state, and the
city of St. Louis, shall elect a public
administrator at the general election
in the year 1880, and every four years
thereafter, who shall be ex officio public
guardian and curator in and for his
county. Before entering on the duties

Honorable Robert E. Wilson:

of his office, he shall take the oath required by the constitution, and enter into bond to the state of Missouri in a sum not less than ten thousand dollars, with two or more securities, approved by the probate court and conditioned that he will faithfully discharge all the duties of his office, which said bond shall be given and oath of office taken on or before the first day of January following his election, and it shall be the duty of the judge of the court to require the public administrator to make a statement annually, under oath, of the amount of property in his hands or under his control as such administrator, for the purpose of ascertaining the amount of bond necessary to secure such property; and such court may from time to time, as occasion shall require, demand additional security of such administrator, and, in default of giving the same within twenty days after such demand, may remove the administrator and appoint another."

The duties of the public administrator are provided for in Section 473.743 and read as follows:

"It shall be the duty of the public administrator to take into his charge and custody the estates of all deceased persons, and the person and estates of all minors, and the estates or person and estate of all insane persons in his county, in the following cases:

"(1) When a stranger dies intestate in the county without relations, or dies leaving a will, and the executor named is absent, or fails to qualify;

"(2) When persons die intestate without any known heirs;

"(3) When persons unknown die or are found dead in the county;

"(4) When money, property, papers or other estate are left in a situation exposed to

Honorable Robert E. Wilson:

loss or damage, and no other person administers on the same;

"(5) When any estate of any person who dies intestate therein, or elsewhere, is left in the county liable to be injured wasted or lost, when said intestate does not leave a known husband, widow or heirs in this state;

"(6) The persons of all minors under the age of fourteen years, whose parents are dead, and who have no legal guardian;

"(7) The estates of all minors whose parents are dead, or, if living, refuse or neglect to qualify as curator, or, having qualified have been removed, or are, from any cause, incompetent to act as such curator, and who have no one authorized by law to take care of and manage their estate;

"(8) The estates or person and estate of all insane persons in his county who have no legal guardian, and no one competent to take charge of such estate, or to act as such guardian, can be found, or is known to the court having jurisdiction, who will qualify;

"(9) Where from any other good cause, said court shall order him to take possession of any estate to prevent its being injured, wasted, purloined or lost."

Other sections of 473.730, et seq., provide for the public administrator's compensation, his powers and duties.

We next refer you to Section 145.150, RSMo 1949, as amended, where the probate court is given jurisdiction over the estate of a decedent in order that it may determine the amount of inheritance tax due the state and provides for the appointment of appraisers to assist the court in reaching its determination. In paragraph 3 of this same statute, provision is made for the qualifications of an appraiser and reads in part as follows:

Honorable Robert E. Wilson:

"* * *appoint some qualified tax-paying citizen of the county, who is not executor, administrator or beneficially interested in the estate or the attorney for any of the parties, as appraiser to appraise and fix the clear market value of any property, estate or interest therein, or income therefrom which is subject to the payment of a tax under this chapter."

The above statute does not appear to prohibit appointment of a public administrator as tax appraiser so long as he is not acting as "administrator or beneficially interested in the estate or the attorney for any of the parties" to the estate.

Nor are we able to find any constitutional limitation prohibiting the public administrator from holding the position of inheritance tax appraiser if he is otherwise qualified and appointed.

There being no apparent constitutional or statutory prohibition against a public administrator serving as tax appraiser, we turn then to see if the job or duties of a public administrator (who is otherwise qualified) are incompatible with the duties of an inheritance tax appraiser.

We have already above quoted the statutory duties of a public administrator. Section 145.160, RSMo 1949, provides for the duties of the tax appraiser and reads in part as follows:

"1. The appraiser shall appraise all property, estate, assets, interest or income at its clear market value and he is hereby authorized to issue subpoenas and compel the attendance before him of witnesses and the production of books, records, documents, papers and all other material evidence, to administer oaths and to take the testimony of all witnesses under oath."

In the case of *In re Hulls' Estate*, 337 Mo. 658, 85 S. W. 2d 621, the functions of an inheritance tax appraiser were discussed and the court said, "Under the act, the probate judge is the assessor. He appoints an appraiser to value the property transferred."

Honorable Robert E. Wilson:

Thus it seems evident that a public administrator can serve as tax appraiser pursuant to his appointment (Section 145.150) and perform the duties of appraiser as provided by Section 145.160, and not be in conflict with his office or duties as public administrator or have abridged any constitutional or statutory enactments, so long as he is acting as appraiser in estates which he is not required to act on as public administrator pursuant to Section 473.743, et seq.

CONCLUSION

The public administrator may be appointed and serve as an inheritance tax appraiser of an estate pursuant to Section 145.150 and there is no incompatibility between a public administrator and a tax appraiser except in cases where he is acting pursuant to Section 473.743, et seq.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, J. Burleigh Arnold.

Very truly yours,

JOHN M. DALTON
Attorney General

JBA

ROADS:
CLOSING:
COUNTY COURTS:

In a situation where, by virtue of the authority granted in Section 228.110, RSMo 1949, twelve freeholders of a township have filed an application with the county court for the closing of a road in such township and no remonstrances against the closing of the road have been filed and the time within which the filing of remonstrances could be made had expired, it is not mandatory upon the county court to close such road, but is discretionary.

September 19, 1960



Honorable Robert E. Wilson
Prosecuting Attorney
Polk County
Bolivar, Missouri

Dear Mr. Wilson:

Your recent request for an official opinion reads:

"The Judges of the Polk County Court have requested that I obtain the opinion of your office as to the construction to be placed on Section 228.110, Laws of Missouri, 1949, with respect to the vacating of a public road. In the situation about which we are concerned, a petition has been presented to the county court by 12 freeholders of the township for the closing of this particular road, the notices have been properly posted and served upon interested parties, and the time for filing remonstrances against the closing of the road has expired and no such remonstrances have been filed.

The relevant part of sub-section 3. of section 228.110 reads as follows: " if no remonstrances be made thereto in writing, signed by at least 12 freeholders, the court may proceed to vacate such road, or any part thereof, at the cost of the petitioners, ****."

The question of the county court is as to whether they have any discretion as to the closing of the road in this situation where no remonstrances are filed. They wish to know if they can lawfully refuse to close any part of this road as requested by the petitioners

Honorable Robert E. Wilson

even though no remonstrances were filed by any person against such closing. Thanking you in advance for your help on this matter, I remain"

As you indicate above the determination of this issue depends upon the meaning to be given to the word "may" as it is used in Section 228.110, RSMo 1949, the pertinent portion of which is set forth above.

We believe that the meaning to be given to permissive words such as "may" in contradistinction to such words as "shall" and "must" is well set forth in the case of State v. City of Maplewood, 99 SW2d 138, a 1936 opinion of the St. Louis Court of Appeals. In that case the court stated (l.c. 142 [5-7]):

"The general rule with respect to the use of permissive words in a statute is stated in 59 C.J. §633, pp. 1077 and 1078, as follows:

'On the other hand, where statutes are purely enabling in character, simply making that legal and possible which otherwise there would be no authority to do, and no public interests in private rights are involved, they will be construed as permissive. Generally, statutes, directing the mode of proceeding by public officers, designed to promote method; system, uniformity, and dispatch in such proceeding, will be regarded as directory if a disregard thereof will not injure the rights of parties, and the statute does not declare what result shall follow noncompliance therewith. * * *

'Permissive words in a statute in respect of officers or courts will not be construed as mandatory where such construction would create a new public obligation; and it has been held that even mandatory words or provisions in a statute defining the duties of administrative officers may be construed as directory only, unless something in the body of the statute indicates the contrary.'

"Our Supreme Court in State ex rel. Ellis v. Brown, 326 Mo. 627, 633, 33 SW2d 104, 107, stated the rule for determining whether a statute is directory or mandatory in the following broad terms: 'There is no universal

rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished."

In this connection we also note the case of *Kansas City, Missouri v. J. I. Case Threshing Mach. Co. et al.*, 87 SW2d 195. In that case the Missouri Supreme Court stated (l.c. 205 [15-17]):

"The words 'may, must, and shall' are constantly used interchangeably in statutes and without regard to their literal meaning; and in each case are to be given that effect which is necessary to carry out the intention of the Legislature as determined by ordinary rules of construction. 59 C. J. 1081, §635; 25 R. C. L. 768, §12; 2 Lewis-Sutherland (2d Ed.) 1153, §640; Maxwell on Interpretation of Statutes (5th Ed.) 389; Endlich on Interpretation of Statutes, 416-419, §§306, 307. 'A mandatory construction will usually be given to the word "may" where public interests are concerned and the public or third persons have a claim de jure that the power conferred should be exercised or whenever something is directed to be done for the sake of justice or the public good.' 59 C. J. 1083, §635. Of course, all of these rules of construction are auxiliary rules. 'The primary rule of construction of statutes or ordinances is to ascertain and give effect to the lawmakers' intent.' *Meyering v. Miller*, 330 Mo. 885, 51 SW2d 65, 68.***"

It will be noted that in the above case the court made a distinction between the use of a permissive word where the statute in which it was contained was "purely enabling in character" and the use of a permissive word in a statute "directing the mode of proceeding by public officers"

The court indicated that the use of the permissive word in the first category was simply permissive, but that in the second category it was mandatory.

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An illustration of the position of the court with respect to the first category is found in the case of State v. Bland, 210 SW2d 31. In that case the Missouri Supreme Court stated (l.c. 36[7-8]):

"It is true Sec. 1516 does provide 'it shall be lawful' for the defendant in a divorce suit to file an answer charging the plaintiff with conduct which would entitle the defendant to a divorce; and it further provides the defendant in the answer 'may' pray for a divorce. This is only permissive, not mandatory, it is true. * * *

In the case of State v. Dinwiddie, 213 Sw2d 127, the Missouri Supreme Court stated (l.c. 130 [4-5]):

"* * *That provision of the statute states: 'The plaintiff may amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant.' (Emphasis ours.) By that provision it is clearly optional with plaintiff whether he will accept the third-party defendant as a defendant in the case * * *

Other cases of the same purport could be adduced.

From the above, it will be noted that ordinarily and unless there is a definite indication to the contrary the word "may" will be regarded as being permissive. We believe that a guiding light in the determination of the meaning of this word is set forth in the case of Kansas City v. J. I. Case Threshing Machine Company, a portion of which opinion is set forth above and in that particular portion wherein it is stated that the words "may", "must" and "shall" are in each case to be given that effect "which is necessary to carry out the intention of the legislature as determined by ordinary rules of construction." With this principle in mind let us attempt to determine what the legislative intent was in the instant situation.

The first sentence of Section 228.110, RSMo, 1949, reads as follows: "Any twelve freeholders of the township or townships through which a road runs may make application for the vacation of any such road or part of the same as useless and the repairing of the same an unreasonable burden upon the district or districts."

From the above it will be seen that an application for a vacation of a road presents a question of fact, and that an

order of the county court vacating a road must be predicated upon a finding in accordance with the underscored words in the above section. It would appear to be highly unreasonable to assume that simply because no remonstrance is filed to such an application that a county court must close its eyes to facts which may be known to it and that a road should be vacated even though the court may know that as a matter of fact such road is not "useless," that the repairing of such road would not be "an unreasonable burden upon the district or districts," and that as a matter of fact the road in question is highly useful and necessary. If it were the law that upon the application set forth in Section 228.110, supra, it was mandatory upon a court to close a road where no remonstrance was filed, it is conceivable that a court might find itself in a position where it was required to order the vacation of a heavily traveled road merely because no one took the trouble to file a remonstrance.

That such is not the law is made clear by the decision of the Missouri Supreme Court in cases arising under this section. That court has consistently held that, in order to vacate a road, the County Court must find that the road is "useless and the repairing of the same an unreasonable burden upon the district or districts." Witte v. Sorrell, 219 SW 595, 596 (2), Burrows v. Carter County, 308 SW(2d) 299, 304 (4). These are jurisdictional facts which must be found to exist before the court can exercise the power conferred upon it and determination of their existence necessarily involves the exercise of discretion and judgment on the part of the County Court. The conclusions and opinions of others cannot be substituted for the courts' judgment and conclusion with regard to such facts. Burrows v. Carter Co., 308 SW (2nd) 1.c. 305.

Clear evidence that the legislature was aware of the implication of discretion arising from the use of the word "may" in the statute presently under consideration may be found by reference to §228.040 RSMo., relating to the opening of roads. There the legislature has provided that when no remonstrance has been filed against the opening of a road, "the County Court, without discretion to do otherwise, must open said road." (Emphasis ours). §§ 228.040 and 228.010 were enacted by the same bill in the General Assembly. Laws of Mo. 1917, p. 442, § 5, § 12. The fact that in such enactment the legislature made quite clear its intention that no discretion be involved under one section certainly indicates a deliberate use of the word "may" in § 228.110, as a grant of discretionary power.

Further evidence of the discretionary nature of the power granted the County Court is clearly gleaned from the provision that the court "may proceed to vacate such road, or any part thereof, * * *" (Emphasis ours). This provision again must mean that the court may exercise judgment and discretion in determining what part, if any, of the road should be closed.

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We would further call attention to the provisions of § 228.070 RSMo 1949, requiring the approval of the county highway engineer for the changing of a road. As shown by the enclosed opinion to Richard Ichord, dated June 25, 1956, the Supreme Court has held that this includes the vacating of a road.

CONCLUSION

It is the opinion of this department that in a situation where, by virtue of the authority granted in Section 228.110, RSMo 1949, twelve freeholders of a township have filed an application with the county court for the closing of a road in such township and no remonstrances against the closing of the road have been filed and the time within which the filing of remonstrances could be made had expired, that it is not mandatory upon the county court to close such road, but is discretionary.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

SHERIFFS: Section 57.105, V.A.M.S., requires the sheriff to fingerprint and photograph only those persons taken into custody upon the execution of a warrant of arrest or placed in his custody by a commitment order of a court.

January 7, 1960



Hon. James E. Woodfill
Prosecuting Attorney
Vernon County
Nevada, Missouri

Dear Mr. Woodfill:

This is in response to your request for an opinion dated November 4, 1959, which reads as follows:

"I am writing for an official opinion in regard to the interpretation of Section 57.105 of the Revised Statutes of Missouri, the same dealing with the fingerprinting and photographing of prisoners.

"Does this section cover minor traffic and license violations?

"In Vernon County, the sheriff takes charge of persons convicted of traffic offenses for the sole purpose of collecting the fine and costs. It would seem to be an additional expense, and unnecessary, if the sheriff were required to photograph and fingerprint each person convicted of a traffic or license violation."

Section 57.105, V.A.M.S., which imposes a duty upon sheriffs of third and fourth class counties to take pictures and fingerprints in certain instances, reads as follows:

"The sheriff in each county of the third and fourth class, shall take pictures of and fingerprint any person accused of or convicted of a criminal offense when the person is taken into or placed in the custody of sheriff. The report shall contain the following information:

- (1) The name of the person;

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- (2) A description of the person, and any other data to identify the person;
- (3) The nature of the criminal offense; and
- (4) Whether the person was accused or convicted.

"The sheriff shall send a copy of the report, including a duplicate picture and fingerprints, to the main office of the state highway patrol, in Jefferson City. The report shall be filed in the office of the highway patrol, and copies of any report shall be available to any sheriff or law enforcement official upon the request of the sheriff or law enforcement official, when necessary in the performance of his official duties." (Emphasis ours.)

We believe that the language used in Section 57.105, supra, shows an intent on the part of the legislature not to require the sheriff to fingerprint and photograph a defendant in a routine traffic case where the defendant has voluntarily appeared in court in response to a summons issued by the arresting officer without the necessity of a warrant of arrest having to be issued and is found guilty and pays his fine and costs or is exonerated.

Section 57.105, supra, requires the sheriff to fingerprint and photograph any person who has been accused of or convicted of a criminal offense when the person is taken into or placed in the custody of the sheriff. It is to be noted that the mere fact that a person is accused of a criminal offense or is convicted of a criminal offense does not require photographing and fingerprinting. In addition to either one of the above mentioned, the person must also be taken into or placed in custody.

We believe that the phrase "criminal offense," as it is used in the statute, is broad enough to include both misdemeanors and felonies. As all traffic offenses are classified as either misdemeanors or felonies, they are necessarily included within the meaning of the phrase "criminal offense." However, as pointed out above, the act not only requires that a person be accused of or convicted of a criminal offense but it further requires that the person also be taken into or placed in the custody of the sheriff before the sheriff is required to photograph or fingerprint. It is our opinion that the phrase "accused of a criminal offense" requires that a formal complaint or information have been filed. United

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States v. Patterson, 150 U.S. 65. It is also our view that the phrase "taken into custody" is to be interpreted to mean that the person was arrested in execution of a warrant of arrest issued after the filing of a complaint or information. It is our further opinion that the phrase "placed in custody" should be interpreted to mean that the person is being held upon a commitment issued by a court either for failure to make bond or to pay a fine and costs imposed upon a conviction or is committed for the purpose of serving a sentence imposed by the court upon conviction.

In view of our holding hereinabove that the statute requires the sheriff to photograph and fingerprint only those persons whom he has taken into custody upon the execution of a warrant of arrest or have been placed in his custody by a commitment order of the court, we do not believe that the sheriff would be required to photograph or fingerprint a person found guilty of a traffic offense under the circumstances described in your request for this opinion. Apparently in the situation mentioned in your letter, the person is issued a summons and appears in court to answer to the summons and therefore is not arrested under a warrant issued by the court. Furthermore, it would appear that the person then enters a plea of guilty or is found guilty and then immediately pays the fine and costs to the sheriff. The fact that the law imposes a duty upon the sheriff to collect fines and costs does not mean that the sheriff in collecting fines and costs actually takes the person, against whom the fine and costs have been imposed, into custody. Should the person be unable to pay the fine and costs and the sheriff take him into custody pursuant to a judgment entered in accordance with the provisions of Section 546.830, RSMo 1949, in that event the person would be "placed in the custody of the sheriff" and he would be required to fulfill the duties required by Section 57.105. Likewise, should a warrant be issued for the arrest of a person charged with a traffic violation and a sheriff arrest such a person in execution of the warrant, he likewise would be required to fulfill the duties required by the statute and take photographs and fingerprints of the person so arrested.

CONCLUSION

It is the opinion of this department that Section 57.105, V.A.M.S., requires the sheriff to fingerprint and photograph only those persons taken into custody upon the execution of a warrant of arrest or placed in his custody by a commitment order of a court.

Hon. James E. Woodfill

The foregoing opinion, which I hereby approve, was prepared by my assistant, Calvin K. Hamilton.

Yours very truly,

JOHN M. DALTON
Attorney General

CKH/mlw

ELECTIONS:
ALIENS:
DISQUALIFIED FROM
VOTING: WHEN:

Filing of petition for naturalization as United States citizen by alien, who has not been finally awarded citizenship, said alien is not citizen of U.S. within the meaning of Article VIII, Section 2, Constitution of Mo., as amended, and is not entitled to vote at any elections by people of Missouri.

March 23, 1960



Honorable Larry M. Woods
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Mr. Woods:

This is to acknowledge receipt of your recent request for a legal opinion which reads as follows:

"Is a person who is an alien and who has taken out papers for American citizenship but not yet become a citizen qualified to vote in school, county and state elections?

"I refer you to Article 8, Section 2 of the Constitution, as amended in November, 1958. You will note that the phrase, 'and no other person' was left out of the new amendment. This seems to raise some question as to whether a person who is not a citizen may now vote."

We construe your inquiry to ask if an alien who has filed a petition for naturalization as an American citizen, but who has not yet become a citizen, is qualified to vote in school, county and state elections.

Reference is made in your letter to Article VIII, Section 2, Constitution of Missouri, 1945, as amended in November, 1958. You comment on the fact that the words "and no other person" in the constitutional provision have been left out of the amendment and this omission seems to raise some question as to whether a person who is not a citizen may now vote.

Article VIII, Section 2, Constitution of Missouri, 1945, read as follows:

"All citizens of the United States, including

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occupants of soldiers' and sailors' homes, over the age of twenty-one who have resided in this state one year, and in the county, city or town sixty days next preceding the election at which they offer to vote, and no other person, shall be entitled to vote at all elections by the people; provided, no idiot, no insane person and no person while kept in any poor house at public expense or while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from voting." (Underscoring ours.)

An amendment to Article VIII, Section 2, supra, was adopted on November 4, 1958, and reads as follows:

"All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one who have resided in this state one year, and in the county, city or town sixty days next preceding the election at which they offer to vote, are entitled to vote at all elections by the people. Citizens of the United States who are otherwise qualified to vote under this section and who have resided in this state sixty days or more, but less than one year, prior to the date of a presidential election may be permitted by law to vote for presidential and vice presidential electors at such election but for no other officers. No idiot, no person who has a guardian of his or her estate or person and no person while kept in any poorhouse at public expense or while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from voting. All persons voting for the presidential and vice presidential electors under the sixty day resident provision shall sign an affidavit as to their eligibility to vote under said section, and any person who falsifies said affidavit shall, upon conviction, be deemed guilty of a felony. Amendment adopted November 4, 1958."

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The qualifications of voters in Article VIII, Section 2, supra, and the amendment are the same in some respects. Both provide that all citizens of the United States, including occupants of Soldiers' and Sailors' Homes, over the age of 21, who have resided in this state one year, and in the county, city or town sixty days next preceding the election at which they offer to vote, as prerequisites for voting at all elections by the people. However, at this point the sameness of the qualifications end. It was here that the original Constitutional provision continued with the words of limitation "and no other person" which phrase has been left out of the amendment.

From the language used in the original constitutional provision, particularly the words "and no other person" it clearly appears to be the intention of the framers of the Constitution that the right to vote at all elections by the people of Missouri should be limited to those citizens of the United States who possess the qualifications therein mentioned and to exclude all other persons.

Apparently, the above mentioned words were intentionally left out of the amendment for the reason the framers of the Constitution did not intend to limit the right of suffrage to those American citizens who possessed all of the qualifications mentioned in the first part of the amendment. Such words would not only have been unnecessary and improper, but would have been in conflict with the second sentence of the amendment, as will presently be noted.

While the first sentence grants the unrestricted right of suffrage to all citizens who possess all the qualifications therein mentioned, the second sentence grants a limited voting privilege to those citizens who cannot meet every requirement under the first sentence.

Under the provisions of the second sentence citizens of the United States possessing all of the qualifications mentioned in the first sentence except residence, and who have resided in the state sixty days or more, but less than a year, preceding the date of a presidential election may by law, be permitted to vote for presidential and vice presidential electors but for no other officials.

Such limited voting privileges authorized by the constitutional amendment have been implemented by Section 1, Senate Bill No. 38, 70th General Assembly, and reads as follows:

"Any citizen of the United States who is otherwise qualified to vote under the constitution of this state and who has resided in this state sixty days or more but less than one year prior to the date of a presidential election may vote for

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presidential and vice-presidential electors at such election but for no other officers. Laws 1959, p. ____ S.B. No. 38, §1."

From the amendment it is noted that only citizens of the United States who meet all of the qualifications imposed by the first sentence are entitled to vote at all elections by the people in the state. It is also noted that if citizens of the United States possessing all of the first mentioned qualifications except the necessary residential requirements may, if they possess the residential qualifications imposed by the second sentence vote for president and vice president.

This brings up the question as to whether or not an alien who has filed a petition for naturalization in the proper court but has not been declared a citizen of the United States is a citizen and qualified voter within the meaning of the above quoted constitutional amendment.

Part 2, Chapter 12, Title 8, U.S.C.A., entitled "Nationalization Through Naturalization" contains the applicable statutes and the prescribed procedure to be followed by one seeking to become a citizen of this country.

In the case of United States v. Lehmann, 136 Fed. Supp., 322, in discussing the naturalization statute at l.c. 327, the court said:

"[5,6] The Naturalization Act of 1906 was designed to prevent the frauds and to correct the abuses that had so frequently occurred in connection with the naturalization of aliens under prior laws. As shown by the cited cases, the statute which specified the manner--'and not otherwise'-- in which admission to citizenship may be obtained, must be followed in precise and strict conformity to the Congressional mandate. It has been rightly said that title to citizenship is the 'most precious gift' within the power of the United States to award to friendly aliens, and Congress has decreed that it shall be awarded only to those who possess all the requisite qualifications and who, in presenting their petitions, exercise the utmost good faith and comply strictly with all the prescribed requirements constituting the manner in which citizenship may be obtained."

Again, in the case of In re Lee Wee's Petition, 143 Fed. Supp., 736, in discussing the naturalization statutes as applicable to the

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facts involved, and the reason given for denying the alien petitioner's petition at l.c. 738, the court said:

"[4] The statutes give an alien the right to submit his petition and evidence to a court, and to have that tribunal judicially pass upon his application in the exercise of judicial judgment and not in the act of conferring or withholding a favor by the court. But the person is entitled to receive such judgment only if requisite facts prescribed by the Acts of Congress are established. In re Tutun, supra. The statutory procedural process required on an application for citizenship has been fully complied with in this case, and the petitioner has no substantive right to become a citizen of the United States contrary to the Act of Congress.

"The petition for naturalization of Lee Wee will be denied on the ground that petitioner has failed to establish good moral character during the period required by law in that he has in fact been convicted of more than two gambling offenses during the requisite five year period."

From the above mentioned cases it is apparent the Federal statutory procedure must be strictly complied with by the alien petitioner before citizenship can be awarded to such petitioner.

While it is true the procedure is begun when an alien files his petition for naturalization in the proper court, although this is only one of many steps which must be taken, and in itself is insufficient to make him a citizen, he was not a citizen before filing the petition and neither can he become one after the petition has been filed when no further steps of the procedure are taken. It is only after every step of the statutory procedure has been taken and the court is sufficiently satisfied of such compliance and a final judgment is rendered awarding citizenship, that the alien legally becomes a citizen of the United States.

Therefore, in answer to the inquiry of the opinion request, it is our thought that an alien who has filed a petition for naturalization and who has not been awarded citizenship by the final judgment of the court in which the proceedings are pending, is not a citizen of the United States within the meaning of Article VIII, Section 2,

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Constitution of Missouri, 1945, as amended, and is disqualified from voting at all elections by the people of Missouri.

CONCLUSION

Therefore, it is the opinion of this office that the filing of a petition for naturalization as a citizen of the United States by an alien, who has not finally been awarded citizenship in accordance with the applicable Federal statutory procedure is not a citizen of the United States within the meaning of Article VIII, Section 2 Constitution of Missouri. Lacking the constitutional qualifications of United States citizenship, such alien is not entitled to vote in any elections by the people of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Paul N. Chitwood.

Yours very truly,

John M. Dalton
Attorney General

PMC:mw

CRIMINAL LAW: A defendant in a felony case may, under the pro-
CRIMINAL PROCEDURE: visions of Section 22(a) of Article I of the
FELONIES: Missouri Constitution of 1945, waive his right
to trial by jury, if approved by the court.
Supreme Court Rule 26.01 establishes the method
of waiver of trial by jury in any criminal case.
Section 546.040, RSMo 1949, requiring mandatory
trial by jury in all felony cases, is uncon-
stitutional.

November 7, 1960

Honorable Larry M. Woods
Prosecuting Attorney
Boone County
Columbia, Missouri



Dear Mr. Woods:

This is in reply to your letter of October 11, 1960, request-
ing an opinion as to whether a defendant in a felony case may,
with the assent of the court, waive a jury trial and try the case
before the court without a jury. Your request reads:

"Reference is made to Section 546.040, R.S.
Missouri 1949 and to Supreme Court Rule
26.01 of the new rules of Criminal Procedure.
These two guides to Missouri criminal pro-
cedure seem to be in conflict inasmuch as
Section 546.040 and the cases cited in head-
note 27 thereunder seems to say that a defend-
ant in a felony case can not waive a trial by
jury, whereas Rule 26.01 seems to say that
the defendant may, with the assent of the Court,
waive a trial by jury and submit the trial of
any criminal case to the Court.

"It has been my understanding in the past that
the statutory provisions will prevail over a
Supreme Court rule where they are in direct
conflict. These two provisions seem to be in
direct conflict to me, so I would appreciate
it if you would give me your opinion in this
matter."

It is our view that the Missouri Constitution of 1945 specif-
ically provides that a jury may be waived by a defendant in a
felony case. Section 22(a) of Article I, of the Constitution of
Missouri, 1945, provides as follows:

"That the right of trial by jury as hereto-
fore enjoyed shall remain inviolate provided
that a jury for the trial of criminal and
civil cases in courts not of record may con-
sist of less than twelve citizens as may be
prescribed by law, and a two-thirds majority

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of such number concurring may render a verdict in all civil cases; that in all civil cases in courts of record, three-fourths of the members of the jury concurring may render a verdict; and that in every criminal case any defendant may, with the assent of the court, waive a jury trial and submit the trial of such case to the court, whose finding shall have the force and effect of a verdict of a jury." (Emphasis ours.)

We interpret this provision to mean that a defendant in a felony case has the unqualified right to a jury trial if he so desires, but that he is also given the right, with the approval of the court, to waive a jury trial and try the issues to the court, in which event the findings of the court have the same force and effect of a determination made by a jury.

The underscored portion of Section 22(a) of Article I, supra, was not embodied in former constitutions of this state and, consequently, it represents an additional right granted to the defendant in a felony case to have the impartial and analytical scrutiny of a circuit judge in trying his case rather than a lay jury, if the defendant so desires. His unqualified right to a jury remains, and waiver of that right will not be inferred or implied. In this respect Rule 26.01 of the Rules of Criminal Procedure promulgated by the Supreme Court of Missouri, effective January 1, 1960, establishes the method of waiver of a jury trial in all criminal cases and is in conformity with the quoted constitutional provision. Rule 26.01 reads:

"(a) All issues of fact in any criminal case shall be tried by a jury to be selected, summoned and returned in the manner prescribed by law, unless trial by jury be waived as provided in this Rule.

"(b) The defendant may, with the assent of the court, waive a trial by jury and submit the trial of any criminal case to the court whose findings shall have the force and effect of the verdict of a jury. Such waiver by the defendant shall be made in open court and entered of record.

"(c) In a case tried without a jury the court shall make a general finding and may in addition in his discretion, find the facts specially. The parties shall be entitled to submit to the court requested findings of fact and declarations of law and the court shall thereupon make such

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findings of fact and give such declarations of law as it deems applicable to the case. All fact issues upon which no specific findings are made shall be deemed found in accordance with the result reached. In felony cases the court shall be required to prepare an opinion or give declarations of law to the extent necessary to indicate the court's theory of the law applicable thereto."

Previous to the Constitution of 1945, there had been no similar provision for waiver of a jury trial in felony cases and the cases decided by our courts had interpreted former constitutions to absolutely require a jury trial in felony cases. See as an example, *State v. Bresse* (1930) 326 Mo. 885, 33 S.W.2d 919, 922[10-11]. The writer has only found one case since the 1945 Constitution in which the Supreme Court of Missouri specifically noted that the Constitution had been changed to provide that a defendant in a felony case could waive a jury trial. In *State v. Hardy* (1950) 359 Mo. 1169, 225 S.W.2d 693, a case before Division No. 2 of the Missouri Supreme Court, the court noted in passing that it was the first case to come before the court where defendant had waived his right to a jury trial in a felony case under the provisions of Section 22(a) of Article I of the 1945 Constitution of Missouri, however, such procedure was not challenged, nor does there appear to be any case challenging this procedure since that case and we can see no possible basis of challenge for such procedure.

The court in the *Hardy* case, *supra*, indicated its view that waiver of a jury trial in a felony case is authorized by the Missouri Constitution of 1945, as follows; l.c. 694:

"* * * Defendant waived a jury, and trial was to the court, as authorized by the new matter appearing as the last clause of §22 Art. I, Const. of Mo., 1945, Mo. R.S.A. This appears to be the first appeal to reach this court in any criminal case tried under this new constitutionally sanctioned procedure."

Accordingly, we turn next to a consideration of Section 546.040, RSMo 1949. This section applies to felonies and reads as follows:

"All issues of fact in any criminal cause shall be tried by a jury, to be selected, summoned and returned in a manner prescribed by law."

Clearly, Section 546.040, *supra*, is mandatory in its meaning and it requires that all felony cases be tried by a jury. This

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section is then in direct conflict with Section 22(a) Article I, of the Missouri Constitution of 1945. At this point another constitutional provision is applicable, that provision being Schedule, Section 2, of the Constitution of Missouri, 1945, which reads as follows:

"All laws in force at the time of the adoption of this constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. All laws inconsistent with this constitution, unless sooner repealed or amended to conform with this constitution, shall remain in full force and effect until July 1, 1946."

By the terms of Section 2 of Schedule, supra, Section 546.040, supra, since it is in direct conflict with Section 22(a) of Article I, supra, would have remained in effect only until July 1, 1946. The Missouri Supreme Court considered Schedule, Section 2, supra, in the case of Pogue v. Swink, 364 Mo. 306, 261 S.W.2d 40, and observed that the State Constitution prevailed over a statute in conflict with any of its provisions by stating at lc. 43:

"A function of a Constitution is to establish the framework and general principles of government. Constitutional legislation prevails over statutory enactments, being superior. We have said: 'Furthermore, it is horn book law that, "if a previous law conflicts with a new constitutional provision, the law withers and decays and stands for naught, as fully as if it had been specifically repealed."'

CONCLUSION

Therefore, it is the opinion of this office that a defendant in a felony case may, with the approval of the court, waive his right to a jury trial and try the case without a jury. This procedure is fully authorized by Section 22(a) of Article I of the Missouri Constitution of 1945, and the proper method of waiving a jury trial in any criminal case is governed by the provisions of Rule 26.01 of the Rules of Criminal Procedure as promulgated

Honorable Larry M. Woods

by the Missouri Supreme Court.

Section 546.040, RSMo 1949, which provides for mandatory trial by a jury in all felony cases, is in conflict with Section 22(a) of Article I, of the Missouri Constitution of 1945 and Section 546.040, RSMo 1949. It is, therefore, unconstitutional.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Jerry B. Buxton.

Yours very truly,

John M. Dalton
Attorney General

JBB:sm

CITIES, TOWNS & VILLAGES:
SPECIAL CHARTER TOWNS:

Bridgeton, Missouri, is a special charter town; sections 106.300 and 80.080 RSMo 1949, do not apply to the town of Bridgeton.

November 8, 1960



Honorable Robert Young
Representative, 1st District
3500 Adie Road
St. Ann, Missouri

Dear Mr. Young:

Your recent request for an official opinion reads:

"I am hereby requesting an interpretation of Sections 106.300 and 80.080 Revised Statutes of Missouri, 1949, and a review of any change in this Section in the 1959 revision.

"My particular questions are:

"1. Since the section makes particular reference to 'city officers' (appointive and elective) is it also to be construed to apply to 'Towns' specifically to the Town of Bridgeton?

"2. In the event the scope of Section 106.300 cannot be construed to apply to 'Towns' is there a corresponding section which applies to 'Towns,' i.e., is there a section of the Revised Statutes which can be or has been interpreted to make a violation of the laws of this state the sale to a town of goods or services by an elected member of its Board of Trustees.

"3. Does Section 80.080 apply to Towns, i.e., to Bridgeton or is it to be construed to apply only to 'villages?'"

Mr. Robert Young:

In your letter you refer to Bridgeton as a "town", which we believe to be a correct reference. It was incorporated by an Act of the Missouri Legislature which was approved February 27, 1843, its charter so designates it. We have been advised by the town clerk that Bridgeton continues to operate under said special charter and therefore, its present status is that of a special charter town.

Your first question is whether Section 106.300 RSMo 1949 applies to the town of Bridgeton. That Section reads:

"If any city officer shall be directly or indirectly interested in any contract under the city, or in any work done by the city, or in furnishing supplies for the city, or any of its institutions, he shall be deemed guilty of a misdemeanor; and any appointed officer becoming so interested shall be dismissed from office immediately by the mayor; and upon the mayor becoming satisfied that any elective officer is so interested, he shall immediately suspend such officer and report the facts to the council, whereupon the council, as soon as practicable, shall be convened to hear and determine the same; and if, by two-thirds vote of the council he be found so interested he shall be immediately dismissed from such office."

We believe the above section to be "penal" in the sense that it is to be strictly rather than liberally construed. In this regard we note the Case of State vs. Kelly 103 Mo. App. 711. In that case one Kelly was indicted for violation of Section 106.300, supra (then Section 2346 RSMo 1889). Kelly moved to quash the indictment on several grounds, one of which was that the indictment which charged violation of what is now Section 106.300, did not charge a criminal offense. The motion to quash was sustained. In setting aside this order the St. Louis Court of Appeals said in part:

"But as the statute provides that a member of a municipal assembly may, for violation of the statute be removed from office, the fourth ground of the motion seems to assume that removal from office is the only penalty with which he can be visited for a violation of this statute. This inference can not be drawn from the section itself; nor is it reconcilable with other provisions of the criminal code, which provide, on conviction of certain officers of certain offenses, in addition to the penalty described, they shall be removed from

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office. No reason can be assigned for exempting a member of a municipal assembly of a city from the punishment prescribed for a violation of the statute. Certainly that he may be removed from office is no sufficient reason, or any reason at all, that he should be exempted from criminal punishment. The statute has not made the exemption and is not within the power of the courts to engraft one upon it in favor of this class of municipal officers."

That a penal statute is to be strictly construed is a well recognized principle of Missouri law. In the case of Willis vs. American National Life Insurance Company, 287 SW2d, 98, the Springfield Court of Appeals stated (l.c. 103-4 [3-9]):

"* * *This has been held to be a penal statute, 'highly penal,' it is sometimes said, and is therefore to be strictly construed. But the expression 'strict construction' has been flung about rather loosely. A work horse definition given by Black's Law Dictionary, p. 1127:

'Construction of a statute or other instrument according to its letter, which recognizes nothing that is not expressed, takes the language used in its exact and technical meaning, and admits no equitable considerations or implications.'

has been approved. The penal provisions can be given 'no broader application than is warranted by its plain and unambiguous terms'. The statute must be applied only to such cases as come clearly within its provisions and manifest spirit and intent.'* * * it is not to be regarded as including anything, not within its letter, as well as its spirit, which is not clearly and intelligibly described in the words of the statute, as well as manifestly intended by the Legislature.'"

We further note that the Missouri statutes make a clear distinction between "city" and "town", putting them in definite and separate classifications. See State ex rel. v. Lichte, 226 Mo. 273, l.c. 290, 126 SW 466.

In view of the fact, therefore, that Section 106.300 is a penal statute, that penal statutes are strictly construed, that Missouri law makes a definite and clear distinction between cities and towns, that Section 106.300 uses only the word "city" in its application, we believe that the section applies only to municipal organizations of the "city" classification, and that since Bridgeton

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is a town Section 106.300 would not apply to it.

Your second question is whether, if section 106.300 can not be construed to apply to towns, there is a corresponding section which does apply to towns.

We find no statutory provision similar to Section 106.300 which would apply to towns such as Bridgeton. We do call attention to the public policy frequently expressed against transactions such as those to which you refer. We are enclosing copies of opinions of this office dated June 30, 1948, addressed to Honorable Fred C. Bollow, and May 15, 1953, addressed to Honorable James T. Riley, in which the matter is discussed as it affects school district directors' dealing with their districts. Town trustees occupy the same position of trust with respect to the town as do school district directors with respect to the school district, and the conclusion of those opinions in such regard would be equally applicable to town trustees.

Your third question is whether or not Section 80.080 applies to the town of Bridgeton. Said section reads as follows:

"Trustees - powers and duties as to members and meetings - the board of trustees shall judge of the qualifications, elections and returns of their own members; they may determine rules of their own proceedings, punish any member or other person for disorderly behavior in their presence, and, with the concurrence of four of the trustees, expel any member, but not a second time for the same cause; they shall keep a journal of their proceedings, and, at the desire of any member, shall cause the yeas and nays to be taken and entered on the journal, on any question, resolution or ordinance; and their proceedings shall be public."

Section 80.080, as originally enacted, was found in the second sentence of Section 6, R.S. Mo. 1825, page 765. The first sentence of said section was what is now Section 80.070. These provisions have not been materially altered since their adoption. What is now Section 80.020 was Section 1 of the 1825 enactment and relates entirely to towns and villages incorporated by the county court. Except insofar as such provisions of the 1825 enactment have been amended to apply expressly to special charter towns, such as in Section 80.030, the provisions of enactments applicable to towns and villages incorporated under general law do not apply to special charter towns. State ex rel. v. Arnold, 136 Mo. 446, 449, 38 SW 79.

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CONCLUSION

Therefore, it is the opinion of this office that Sections 106.300 and 80.080, RSMo 1949, do not apply to the town of Bridgeton, nor to the members of its town board of trustees, inasmuch as Bridgeton is a town organized and existing under special charter. However, dealings between members of the board of trustees and such town are contrary to public policy.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

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